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Supreme Court of the United States

OCTOBER TERM 1965

No. 671

NORTH TEXAS PRODUCERS ASSOCIATION,
Petitioner,

versus

METZGER DAIRIES, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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METZGER DAIRIES, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

North Texas Producers Association, your petitioner, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on June 21, 1965.

OPINIONS BELOW

The Opinion of the Court of Appeals (*infra*, Appendix A, page 23) is reported at 348 F. 2d 189 (5th Cir., 1965). The *per curiam* Opinion denying rehearing is unreported.

JURISDICTION

The Judgment of the Court of Appeals was entered on the 21st day of June, 1965 (*infra*, Appendix B, page 36). A petition for Rehearing timely filed was denied on the

16th day of July, 1965 (*infra*, Appendix C, page 37). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A., Section 1254(1).

QUESTIONS PRESENTED

(1) Where a jury has reached its verdict following a lengthy trial and deliberation with highly disputed factual issues, is it not error and a denial of the right to trial by jury guaranteed by the Seventh Amendment to the United States Constitution for the Judge to set the verdict aside on the basis that he would have weighed the evidence in a different manner and reached a different result?

(2) Conceding that the right of a Judge to set aside a jury verdict generally is discretionary, does it not infringe on the rights guaranteed citizens by the Seventh Amendment to the United States Constitution to set aside a jury verdict and grant a new trial without assigning a valid reason therefor?

(3) Where, in a treble damage action under the Sherman Act, following deliberation of the jury and its report of deadlock, the trial judge reads to the jury the **Allen** or "dynamite charge", without either party objecting thereto, is it not error for the trial judge to assign as a reason for setting aside the subsequent jury verdict in favor of the defendant and granting a new trial, his own action in reading the **Allen** charge, where the reading of such charge was not an abuse of discretion?

(4) Where counsel for plaintiff has not objected to the reading of the **Allen** charge and does not and cannot under the Federal Rules of Civil Procedure assign such reading as error in his application for new trial, is it not error for counsel for plaintiff to file of record with such application and for the trial court to accept and rely upon

in granting a new trial, an affidavit of a juror setting forth that he was influenced by the reading of the Allen charge, in effect impeaching his own verdict?

(5) Where there has been no "plain error", is it not error and a violation of the Federal Rules of Civil Procedure for the trial judge to grant a new trial for reasons which were not and could not be assigned as error in the application for new trial?

(6) Where a jury in a treble damage action has reached its verdict folowing a lengthy trial and deliberation, is it not error to assign as a reason for granting a new trial, an assumption that the jury was influenced by knowledge that any damages awarded would be trebled?

(7) Where a jury has reached its verdict following a lengthy trial and deliberation, is it not error to assign as a reason for granting a new trial the fact that another case is awaiting trial in the same court which may involve similar questions of fact and law?

STATUTES INVOLVED

The statutes involved are set out in Appendix D *(infra*, page 38), being the Seventh Amendment to the Constitution of the United States and Rules 51 and 59 of the Federal Rules of Civil Procedure, 28 U.S.C. §§ 51 and 59.

STATEMENT

This case was tried twice. Each trial was lengthy and in each trial the evidence was substantially the same. In the first trial the jury found for the defendant. In the second trial the jury found for the plaintiff.

The essence of this application is the error allegedly committed by the trial judge in setting aside the first

verdict. It is conceded for purposes of this application, that there is adequate evidence to sustain the second verdict. It is evident that the jury at the second trial believed the plaintiff's witnesses, including a disgruntled ex-director of the defendant milk cooperative, while the jury at the first trial plainly disbelieved those same witnesses and believed the witnesses produced by the defendant.

Petitioner, North Texas Producers Association, is a dairy cooperative enjoying a membership of approximately 2,500 milk farmers in and around the Dallas-Fort Worth area, being organized and conducting business pursuant to the provisions of the Capper-Volstead Act, 7 U.S.C. §§ 291 and 292. Respondent, Metzger Dairies, Inc., owns and operates a large milk plant in Dallas and at the outbreak of the dispute which became the subject of this litigation was one of petitioner's customers.

On August 29, 1958, as it had a right to do, petitioner announced that effective September 1, 1958, the price that it charged for raw milk would be raised 30 cents per hundred pounds, or 30 cents per cwt. over the minimum price of $5.30 per cwt. established for the marketing area by the Federal Market Administrator. Respondent, Metzger Dairies, Inc., refused to accept this raise in prices and commenced importation of milk from other market areas, thereby precipitating actions and conduct leading to the filing by each party of a treble damage suit against the other.

The treble damage suit which is the subject of this application was filed by respondent on August 24, 1959, charging the Association with monopolizing and attempting to monopolize the marketing of milk in the Dallas-Fort Worth area, in violation of Section 2 of the Sherman Act. 15 U.S.C. § 2. Petitioner's treble damage suit against re-

spondent was filed on December 1, 1961, three days prior to the commencement of trial of respondent's suit and charged the existence of a conspiracy in violation of the anti-trust laws. The suit filed by Metzger nonetheless proceeded to trial on December 4, 1961, without any effort being made by any party or the court to consolidate the two actions.

In its answer to respondent's complaint, petitioner denied that it was a monopoly or guilty of monopolizing or that it or its officers had taken part in or instigated any predatory practices in violation of the anti-trust laws which had resulted in damages to respondent. Petitioner produced abundant evidence to this effect at the first trial, some of which was naturally in conflict with that produced by respondent. Ten days were consumed in presenting this evidence to the jury. After deliberating another day and a half, the jury reported it was unable to reach a decision and the court then read to the jury, **without** objection of either party, the so-called **Allen** or "dynamite charge" approved by this Court in *Allen v. United States*, 1896, 164 U.S. 492, 501; 41 L. Ed. 528, 17 S. Ct. 154. The jury then deliberated another hour and twenty minutes and returned a verdict for the defendant Association, your petitioner herein.

Following the verdict of the jury, petitioner filed a Motion for Judgment on the Verdict (*infra*, Appendix E, page 40) and respondent filed a Motion for Judgment N.O.V. or in the alternative for a new trial. (*infra*, Appendix F, page 42). While not assigning the reading of the **Allen** charge as error, respondent nonetheless attached to its motion an affidavit of one of the jurors, in which the juror sought to impeach his own verdict, claiming that he had felt compelled to decide in petitioner's favor after the court gave the **Allen** charge. (*infra*, Appendix F, page 54).

More than ten days after the jury had reached its verdict, the trial judge denied petitioner's motion for entry of judgment on the verdict and respondent's motion for Judgment N.O.V., but granted respondent's motion for a new trial (*infra*, Appendix G, page 59) In doing so, the trial judge made the ruly remarkable statement set forth hereinafter as an appendix. (*infra*, Appendix H, page 61).

A review of respondent's motion for Judgment N.O.V. and for a new trial (*infra*, Appendix F, page 42), will show that the sole assignment of error that was made was that the jury's verdict was contrary to the weight of the evidence. While the trial judge, without further explanation, assigned this as one of his reasons for granting a new trial, a review of his statement (*infra*, Appendix H, page 61), will show that his primary reason there for was his belief that in reading the **Allen** charge he had coerced a verdict in favor of petitioner. Additional reasons assigned, was the trial judge's fear that the jury might have been influenced by knowledge that any damages awarded would be trebled and also his desire to consolidate the matter with the pending action involving the same subject matter which had been brought by petitioner.

A year and a half later the instant case went to trial for the second time before the same trial judge, this time consolidated with the action brought by petitioner. As in the first trial, petitioner produced abundant evidence refuting the existence of an unlawful monopoly or its participation in monopolistic practices or anything other than lawful business activities of a Capper-Volstead corporation. On the contrary, the Association contended that it had itself been subjected to unfair trade practices by Metzger authorizing recovery under the anti-trust laws. However, after another lengthy trial, which, even without con-

sidering the attendant publicity associated with the first trial, petitioner contended was conducted in a manner most likely to result in a verdict for respondent (See petitioner's Motion for a Judgment Notwithtsanding the Verdict and for a New Trial, set forth hereinafter as Appendix I, page 67), the trial judge refused to submit petitioner's case to the jury and after submission to and deliberation by the jury of respondent's case, the jury returned a verdict in favor of respondent and assessed damages at $365,000.00. Despite his statement after the first trial that he would not permit such a harsh verdict (*infra*, Appendix H, page 65), immediately thereafter the court granted respondent's Motion for Judgment on the Verdict and trebled the amount of damages to $1,095,000.00, which together with an award of $25,000.00 attorney's fees, made a total judgment of $1,120,000.00 plus costs and interest. From this judgment, petitioner appealed unsuccessfully to the United States Court of Appeals for the Fifth Circuit and now presents this application for Writ of Certiorari.

ARGUMENT

This Honorable Court, in a plethora of criminal cases, has over the years safeguarded strenuously the rights guaranteed to an accused by the Sixth Amendment to the United States Constitution, of a trial by jury. As was stated by this Court in *Glasser v. United States*, 1942, 315 U.S. 60, 67; 86 L. Ed. 680, 698; 62 S. Ct. 457:

> "In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt."

Like the Sixth Amendment, the Seventh Amendment to the United States Constitution preserves to an accused in civil cases, the right of trial by jury and further provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." But how is that right in fact preserved to the accused by the Courts and where are the cases which have safeguarded that right? Unfortunately, rather than a plethora, there exists a paucity of such cases. On the contrary, the accused in a civil case, having seen a jury verdict in his favor snatched away by a trial judge is confronted on appeal by statements such as that made by the Fifth Circuit Court of Appeal in the instant case, in response to a vast array of assigned errors (348 F. 2d 193):

> "Ordinarily an order granting a motion for new trial is not appealable. It is, however, reviewable on appeal from the final judgment following the second trial. **The scope of review is extremely limited because of the very broad discretion vested in the district judge."** (Emhpasis supplied)

In making the above statement, the Court of Appeal cited as authority the case of *Marsh v. Illinois Cent. R. Co.*, 5 Cir. 1949, 175 F. 2d 498, wherein similar language is found, i.e.:

175 F. 2d 499:

> " * * * the common law power of the trial judge to grant a new trial **in his discretion, irrespective of error and merely because he does not think the verdict right, is fully preserved."** (Emphasis supplied)

175 F. 2d 500:

> "A motion for new trial is addressed to the trial judge's discretion. He may grant a new trial **if he thinks he has committed error,** and he may grant

> one (and he alone can) **because he thinks the verdict is wrong,** though supported by some evidence. The exercise of his discretion **is not ordinarily reviewable** on appeal, though a failure to exercise discretion, or an abuse of it, may be corrected." (Emphasis supplied)

While the last portion of the latter quotation would seem to preserve to the accused some right on appeal, the response received invariably, as in the instant case, is that in ordering a new trial the trial judge "did not abuse the broad discretion vested in him." 348 F. 2d 193. As a matter of fact, exhaustive research seems to reveal that in its long history, the Fifth Circuit Court of Appeal has **never** reversed a trial court's granting of a new trial on any ground and, further, again after exhaustive research, petitioner has found only one case where an appellate court has reversed a trial judge's granting of a new trial on the ground that the verdict was against the weight of the evidence, namely, *Lind v. Schenley Industries, Inc.*, 3 Cir. 1960, 278 F. 2d 79. How then has the right of trial by jury been preserved? In truth, it has not.

Petitioner submits that on this 750th Anniversary of the Magna Carta it would be most appropriate for this Court to rededicate our judicial system to these principles so fundamental in the law. Perhaps this Honorable Court can explain to the 2500 farmers who compose the defendant co-operative why they have not been deprived of trial by jury under these circumstances. Certainly, counsel for petitioner have not been able to give them any acceptable explanation.

Petitioner submits that the instant case is an ideal vehicle by which this Honorable Court may restore to the accused in civil cases his right of trial by jury. It has been recognized that the rights guaranteed by the Seventh

Amendment avail in treble damage actions arising under the anti-trust laws. *Meeker v. Lehigh Valley R. Co.*, C.C. N.Y. 1908, 162 Fed. 354; *Siegfried v. The Kansas City Star Company*, 8 Cir. 1962, 298 F. 2d 1, Cert. den., 369 U.S. 817, 7 L. Ed. 2d 785, 82 S. Ct. 831; 2 Trade Reg. Reporter, ¶¶ 9737, 9193. In addition, it has been stated that an action for treble damages partakes of the nature of a criminal charge and that the proof required to establish such violation should be stronger than in ordinary civil actions. *Paramount Film Distributing Corporation v. Applebaum*, 5 Cir. 1954, 217 F. 2d 101. See, also, *Gordon v. Loew's Incorporated*, 3 Cir. 1957, 247 F. 451, 456-457, Note 11. The exposure to the statutory penalty of having the damages trebled and to possible criminal prosecution should the charge be established makes manifest the wisdom of such a rule. Thus, the protection that should be afforded an accused by the Seventh Amendment assumes tremendous importance in such cases.

In the instant case, petitioner has submitted seven reasons why the trial judge committed error in granting a new trial. These are:

(1) A verdict should not be set aside merely because the trial judge would weigh the evidence in a different manner and reach a different result.

(2) A jury verdict should not be set aside without assigning valid reasons therefor.

(3) That the reading of the Allen charge where not objected to and where found not to be an abuse of discretion, cannot be assigned as a reason for granting a new trial.

(4) The submission and acceptance of an affidavit of a juror, impeaching his own verdict, is manifest error, particularly where the purpose for which submitted was not, and under Rule 51 of the Federal Rules of Civil Procedure, could not be assigned as error.

(5) Under Rule 59 of the Federal Rules of Civil Procedure, in the absence of "plain error", a court cannot grant a new trial on its own motion.

(6) The fact that damages must be trebled or a jury's fear that its award would be trebled cannot serve as grounds for granting a new trial.

(7) The fact that a similar case is pending is not grounds for upsetting a verdict and granting a new trial.

In its opinion, the Court of Appeal disposed of petitioner's arguments in five sentences, as follows, 348 F. 2d 193:

> "The district judge was quite frankly of the opinion that on the first trial the verdict should have gone for the plaintiff. The jury had reported in writing that 'We the jury are unable to reach a decision.' Neither party having objected, it cannot be said that the reading of the Allen Charge was an abuse of discretion on the part of the district judge. When, however, under all the circumstances, the judge concluded that the giving of that charge had the effect of coercing the jury and of causing it to return an unjust verdict, it became his duty to grant a new trial. In so doing, he did not abuse the broad discretion vested in him."

Surely, in view of the seriousness of the result, petitioner is entitled to have its charges answered more specifically. These charges are discussed hereinafter.

(1) and (2) *The Weight of the Evidence.*

Since points (1) and (2) named above involve the same action of the trial judge, they will be discussed together.

In its order granting a new trial (*infra*, Appendix G, page 59), the trial court stated as a reason that "consider-

ing the evidence as a whole and weighing it, the Court is of the opinion that the verdict of the Jury is wrong and is contrary to the weight of the evidence." In his statement made in connection with the granting of a new trial, the court (*infra*, Appendix H, page 61), gave no reasons wherein the verdict was contrary to the weight of the evidence other than to state that "There is a great deal of evidence in this case, as I said, to indicate the presence of a monopoly" and, with respect to the verdict, merely "I am not satisfied with the result of it." Surely, in view of the fact that under the Capper-Volstead Act, petitioner has a perfect right to be a monopoly and considering that the case was hotly contested through ten days of trial, something more should be required to upset a verdict reached after two days of deliberation, than an expression by the trial judge that he is dissatisfied with the result. Abundant evidence was produced on either side, which the jury had a right to believe or disbelieve and just because the trial judge was impressed by or chose to believe some of it should not be grounds for setting aside a jury's verdict to the contrary.

While few cases may exist wherein a trial judge's actions in granting a new trial have been set aside, there are many cases which nonetheless at least establish some requirements which must be met if the trial judge is to take such action. Contrary to the view evidently entertained by the Fifth Circuit, the cases are legion to the effect that the right to grant a new trial is not absolute and that a trial judge should not substitute his own opinion on the evidence for that of the jury. As stated by this Court in *Mary Tennant v. Peoria & Pekin, Union Railway Comapny*, 321 U.S. 29, 35, 88 L. Ed. 520, 525 (1944):

> "The focal point of judicial review is reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court,

> which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable (citing cases). That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. **Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."** (Emphasis supplied)

See also, language in *Indamer Corporation v. Crandon*, 217 F. 2d 391 (C.A. 5, 1954), wherein Judge Tuttle quoted from *Lavender v. Kurn*, 327 U.S. 645, 653, 66 S. Ct. 740, 744, 90 L. Ed. 916, as follows:

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

See also, the language set forth in the following cases:

Dunn v. Conemaugh & Black Lick R.R., 162 F. Supp. 324, 331 (W.D. Pa. 1958) aff'd 267 F. 2d 571 (C.A. 3, 1959);

Locke v. Atchison, Topeka and Santa Fe Ry. Co., 309 F. 2d 811, 817 (C.A. 10, 1962);

Tidewater Oil Company v. Waller, 320 F. 2d 638, 643 (C.A. 10, 1962);

Lind v. Schenley Industries, Inc., 278 F. 2d 79, 89 (C.A. 3, 1960);

Schirra v. Delaware, L. & W. R. Co., 103 F. Supp. 812, 820 (D.C. M.D. Pa., 1952);
U. S. v. 13.40 Acres of Land, 56 F. Supp. 535, (N.D. Cal., 1944);
Miller v. Pacific Mutual Life Ins. Co., 17 F.R.D. 121, 125 (D.C. W.D. Mich., 1954);
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Lyophile-Croyochem Corp. v. Cutter Laboratories, Inc., 78 F. Supp. 903, 904 (N.D. Cal. 1948).

The pronouncements of the Fifth Circuit on this subject are therefore quite obviously in conflict with those of this Honorable Court and those of other Circuits, and it is submitted that an order should be entered granting a review of this subject by this Honorable Court to the end that all Courts will treat the matter uniformly. In this respect, the harsh rule pronounced by the Fifth Circuit should be set aside to the end that the rights guaranteed by the Seventh Amendment may be preserved.

A review of the record in this case will make it manifest that the trial judge abused his discretion in granting the new trial, for petitioner presented abundant reasonable and plausible defenses in refutation of each and every charge brought by respondent and was entitled to have the jury decide whether these defenses were to be believed. The jury chose to believe defendant's witnesses and it is not for the trial court to substitute its opinion for that of the jury. Surely, in this case, a treble damage action in the nature of a criminal proceeding in which stronger proof is required than in ordinary cases, where the jury has returned a verdict of acquittal, the safeguards provided by the Seventh Amendment should be rigidly enforced in order that the sanctity of that verdict may be preserved. It is respectfully submitted that this Court should recognize that the trial judge abused his discretion in granting a new trial and that the granting of the new trial should be set aside and the original verdict of the jury reinstated.

(3) *The Reading of the Allen Charge.*

In its order granting a new trial (*infra*, Appendix G, page 59), the Court submitted as a reason its "opinion that error was committed in statements made by the Court to the members of the Jury after the Jury had indicated in writing that they were unable to reach a verdict, which statements by the Court had the effect of coercing the verdict." The court, of course, was referring to its reading of the **Allen** charge. However, Rule 51 of the Federal Rules of Civil Procedure provides that "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict." Respondent did not object to the reading of the **Allen** charge and as a consequence, under Rule 51, was barred from assigning and did not assign such reading as error in its motion for new trial. The Court of Appeal found that "the reading of the **Allen** charge was [not] an abuse of discretion on the part of the district judge." Yet, it permitted the trial judge to assign as the principal reason for granting a new trial, the reading of the **Allen** charge. If the reading of the charge was not error and was not and could not be assigned as error by respondent, how, then, can it nonetheless serve as a basis for granting a new trial? Surely, if the trial judge erred in assigning it as a basis for granting a new trial, his action should be reversed and the verdict reinstated. To do otherwise is to deny justice.

(4) *The Submission of the Juror's Affidavit.*

While respondent did not assign the reading of the **Allen** charge as error, it nonetheless undertook to influence

the trial court by attaching to its motion for new trial, an affidavit of a juror to the effect that he was influenced in his decision by the reading of that charge, thereby impeaching his own verdict. (*infra*, Appendix F, page 54). That such affidavit had a profound effect upon the trial judge is manifest from the statements made by him in subsequently granting a new trial. The filing of such affidavit by respondent was a gross and flagrant violation of Rule 51 of the Federal Rules of Civil Procedure and should of itself be grounds for reversal. But the acceptance thereof and reliance thereon of the trial judge was an even graver offense, constituting as it does an abuse of a long established rule against such practices. The authorities are legion in this respect. See 7 Moore's Federal Practice, ¶ 59.08(4), p. 3791, et seq.; *United States v. Reid*, 1851, 12 How, 361, 12 L. Ed. 1023; *Mattox v. United States*, 1892, 146 U.S. 140, 36 L. Ed. 917, 13 S. Ct. 50; *Hyde v. United States*, 1912, 225 U.S. 347, 384; 56 L. Ed. 1114, 32 S. Ct. 793; and *McDonald v. Pless*, 1915, 238 U.S. 264, 266-268; 59 L. Ed. 1300, 35 S. Ct. 783. The Court of Appeal did not respond to this serious charge, contenting itself to affirm the trial judge's exercise of discretion. Surely, if this discretion was exercised in reliance upon illegal evidence, then the wisdom of the decision to grant a new trial should become suspect automatically and should be reversed.

(5) *The Granting of a New Trial on the Court's Own Motion.*

Rule 59(d) of the Federal Rules of Civil Procedure provides that "Not later than 10 days after entry of judgment the court of its own initiative may order a new trial

for any reason for which it might have granted a new trial on motion of a party." (Emphasis supplied) It has been observed that neither petitioner nor respondent objected to the reading of the **Allen** charge and that respondent did not and could not assign as error the reading of the **Allen** charge. It has been further observed that the Court of Appeal found that the reading thereof was not an abuse of discretion and, hence, not "plain error." Yet the trial judge assigned the reading thereof as his principal ground for granting a new trial. In doing so, it is apparent that he acted on his own initiative and, hence, his conduct was in violation of Rule 59(d) of the Federal Rules of Civil Procedure for the new trial was granted for a reason for which it could not be granted "on motion of a party." The assignment of the reading of the **Allen** charge as a basis for granting a new trial was therefore reversible error and should have been entertained as such by the Court of Appeal.

(6) ***The Jury's Fear of Treble Damages.***

In granting a new trial, the trial judge stated (*infra*, Appendix H, page 65) :

> "There was another thing along that line that, of course, I am sure must have influenced the jury * * * and that was the three-way penalty. * * * The jury had no knowledge of the fact that it might be reduced or cut down, and they couldn't help but see that point, that this company, this organization of farmers, who had organized themselves to protect themselves and had organized under the law, were going to be virtually put out of business on a judgment three times the amount of the damage that was done."

But even then, there is absolutely no evidence in the rec-

ord which would indicate or imply that the jury returned its verdict for the purpose of avoiding imposition of treble damages. Furthermore, had the jury known that its award would be trebled and wished to avoid having a large judgment imposed upon petitioner, it more logically would have reduced the amount of its award accordingly, rather than render a judgment for petitioner. In truth, the trial judge was merely speculating as to the motives of the jury and such speculation can hardly be sufficient basis for granting a new trial. The fear which the judge felt the jury entertained is one which can be present in any and all treble damage cases and to submit it as a basis for granting a new trial is to assert grounds which could be used to defeat all treble damage verdicts. Petitioner's search of the jurisprudence has failed to reveal a single case where this ground has ever been assigned as the basis for granting a new trial. Surely, reversible error was committed which should not have been condoned by the Court of Appeal.

(7) *The Pendency of a Similar Case.*

In granting a new trial, the trial judge stated (*infra*, Appendix H, page 66):

> "* * * whether we grant a new trial or not, we will have to go over this thing again, and another suit has been brought which charges the plaintiff Metzger with doing all the things that he charges the defendants with doing, and when we try that case we are going right back over the same field and the same law, and the same line of witnesses that we have already gone over.
>
> "The Court has in mind, therefore, to grant a

> new trial in this case and consolidate it with the other case that is yet to be tried. And will so order."

The above quoted language clearly reveals that the pendency of petitioner's suit against respondent was a factor which motivated the trial judge in granting a new trial. However, petitioner's suit was pending at the time that the first trial commenced and neither the court nor respondent sought to have it consolidated with respondent's situ. An exhaustive review of the jurisprudence has failed to reveal a single case in which a jury's verdict has been set aside for a similar reason. To do so is in effect to undo what has been done and to upset the finality of a jury's verdict merely to suit the convenience of the court. Surely, such conduct constitutes reversible error and should not have been condoned by the Court of Appeal.

CONCLUSION

The present case calls into focus the apparent conflict between the Circuits in their treatment of cases involving the granting of new trials. It also calls into focus the present practices of some of our Federal Appellate Courts of affirming any and all decisions of our district judges to grant a new trial. In the instant case, abundant issues were presented to the Court of Appeal calling to its attention wherein the trial judge had erred in granting a new trial. These issues were not even discussed in the Court of Appeal's opinion, which simply preferred not to inquire into what it considered a matter within the "broad discretion" of the trial court. Petitioner has here presented those same issues to this Honorable Court and asks that

this Court determine whether jury verdicts may be so lightly regarded. Petitioner submits that this Court should declare that the Seventh Amendment to the Constitution enjoys equal dignity with all other provisions of that sacred document and enforce it accordingly.

Respectfully submitted,

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By:_____
Ashton Phelps

Of Counsel:

ODENEAL & ODENEAL,
PHELPS, DUNBAR, MARKS,
CLAVERIE & SIMS.

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20956

NORTH TEXAS PRODUCERS ASSOCIATION,
Appellant,

versus

METZGER DAIRIES, INC.,
Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(June 21, 1965.)

Before MARIS,* RIVES and BROWN, Circuit Judges.

RIVES, Circuit Judge: Metzger Dairies, Inc. brought a civil action for treble damages[1] against North Texas Producers Association. The complaint charged violations of section 2(e) and 3 of the Clayton Act, 15 U.S.C. § 13(e) and 14, and also of section 2 of the Sherman Act, 15 U.S.C. § 2. Upon the trial, Metzger abandoned any claimed violations of the Clayton Act and the case was submitted to

the jury solely on the charge of violating section 2 of the Sherman Act.[2]

The complaint charged the Association with monopolizing and attempting to monopolize the marketing of raw milk in the Dallas-Fort Worth area by (a) control of the supply, (b) control of transportation, (c) refusal to transport milk for nonmembers of the Association, (d) boycott and coercion against Metzger, (e) covert attempt to purchase Metzger, (f) refusal to sell raw milk to Metzger unless Metzger stopped purchasing from Association's competitors, (g) purchase of other milk plants. The complaint claimed damages from the increased cost of Metzger of raw milk caused by the claimed predatory trade practices, and from the loss of profits from the sale of Metzger's dairy products resulting from boycotts induced by the Association in Wise and Hopkins Counties, Texas.

The Association denied the charges of monopolizing or attempting to monopolize and denied Metzger's claimed damages. It insisted that its operations were simply legitimate marketing procedures, by which it served the interest of its members, within the protection of section 6

---

* Of the Third Circuit, sitting by designation.

[1] Under 15 U.S.C. § 15.

[2] "§ 2. *Monopolizing trade a misdemeanor; penalty*
"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 15 U.S.S. § 2.

[3] "§ 17. *Antitrust laws not applicable to labor organizations*
"The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." 15 U.S.C.

of the Clayton Act[3] and of section 1 of the Capper-Volstead Act.[4]

The original complaint was filed August 24, 1959. On May 2, 1960, the Supreme Court in the case of *Maryland Milk Producers Association v. United States*, 362 U.S. 458, settled the basic principles of law which control the decision of this case. It was there held that section 6 of the Clayton Act and section 1 of the Capper-Volstead Act did not immunize cooperative associations from the anti-monopolization provisions of section 2 of the Sherman Act. Mr. Justice Black speaking for the Court stated the law in plain and simple language which can be understood by laymen and lawyers alike:

> ". . . . Thus, the full effect of § 6 [of the Clayton Act] is that a group of farmers acting together as a single entity in an association cannot be restrained 'from lawfully carrying out *the legitimate objects* thereof' (emphasis supplied), but the section cannot support the contention that it gives such an entity full freedom to engage in predatory trade practices at will. . . .
>
> ". . . . We believe it is reasonably clear from the very language of the Capper-Volstead Act, as

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[4] "§ 291. *Authorization of associations; powers*

Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however*, That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

"First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

"Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

"And in any case to the following:

"Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members." 7 U.S.C.

> it was in §6 of the Clayton Act, that the general philosophy of both was simply that individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive advantage—and responsibility—available to businessmen acting through corporations as entities."

Maryland Milk Producers Association v. United States, 1960, 362 U.S. 458, 465, 466.

The first trial of this case was set for Monday, December 4, 1961. On the preceding Friday, December 1, 1961, the Association as plaintiff filed a separate complaint for treble damages under the antitrust laws against Metzger and its alleged co-conspirators. That complaint charged in part:

> "Defendants carried their plan and conspiracy into effect beginning in October 1958 and continuing to this date by transporting raw milk from Kansas and surrounding areas to the Dallas, Texas, area in quantities in excess of Five Million (5,000,000) pounds per month, which was processed and sold in the North Texas area by Defendant, Metzger Dairies, Inc."

The transportation of raw milk from Kansas and surrounding areas to Metzger's plant in Dallas was thus involved in both suits. Nonetheless, trial of the present case commenced on the day set and the case was submitted to the jury ten days later, on December 14, 1961. The jury deliberated for approximately a day and a half and reported to the court that it was unable to reach a decision. The court then read to the jury, without objection by either party, the so-called "dynamite charge" employed in *Allen v. United States*, 1896, 164 U.S. 492, 501. After deliberating for another hour and twenty minutes, the jury returned a verdict for the defendant Association.

The court denied the motion of the defendant Association for the entry of judgment of that verdict and, instead ordered

> ". . . that the motion of Plaintiff for new trial be granted on the grounds that, considering the evidence as a whole and weighing it, the Court is of the opinion that the verdict of the Jury is wrong and is contrary to the weight of the evidence, and for the further reason that the Court is of the opinion that error was committed in statements made by the Court to the members of the Jury after the Jury had indicated in writing the they were unable to reach a verdict, which statements by the Court had the effect of coercing the verdict.
>
> "It further appears to the Court that Civil Action No. 8989, styled North Texas Producers Association vs. Jacob Metzger, et al, now pending in the United States District Court for the Northern District of Texas at Dallas, involves common questions of law and fact with this cause and, it is
>
> "ORDERED that Civil Action No. 8989 be consolidated with this Civil Action No. 8271."

A year and a half later the case went to trial for the second time, along with the consolidated cross action. The Association dismssed from its cross action all defendants except Metzger Dairies, Inc. and Jacob Metzger. The Court ruled as a matter of law that the cross complaint should not be submitted to the jury and that judgment be entered that the Association take nothing in its cross action. The appellant Association makes no complaint as to that ruling.

The jury returned a verdict for the plaintiff Metzger Dairies, Inc., and assessed its damages at $365,000. The court entered judgment for treble that sum or $1,095,000, plus attorney's fees in the sum of $25,000, costs, and interest.

On appeal, the first insistence is that the district court erred in granting plaintiff's motion for a new trial and in refusing to grant defendant's motion for judgment on the verdict at the conclusion of the first trial. Ordinarily an order granting a motion for new trial is not appealable. It is, however, reviewable on appeal from the final judgment following the second trial.[5] The scope of review is extremely limited because of the very broad discretion vested in the district judge.[6]

The district judge was quite frankly of the opinion that on the first trial the verdict should have gone for the plaintiff.[7] The jury had reported in writing that, "We the jury are unable to reach a decision." Neither party having objected, it cannot be said that the reading of the *Allen* charge was an abuse of discretion on the part of the district judge.[8] When, however, under all the circumstances, the judge concluded that the giving of that charge had the effect of coercing the jury and of causing it to return an unjust verdict, it became his duty to grant a new trial. In so doing, he did not abuse the broad discretion vested in him.

We come then to consider whether the practices complained of and established by the evidence were monopolistic or attempts to monopolize proscribed by section 2 of the Sherman Act, or were no more than "lawfully carrying out the legitimate objects" of an agricultural co-

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[5] 3 Barron & Holtzoff, Federal Practice & Procedure, § 1302.1.

[6] Marsh v. Illinois Cent. R. Co., 5 Cir. 1949, 175 F.2d 498, 499; Willitt v. Purvis, 5 Cir. 1960, 276 F.2d 129, 132; 6 Moore, Federal Practice, 2d ed. p. 3820.

[7] "Now, I thought when the jury was hung, that after so long a trial and so much involved, and the labor and expense of another trial, that the jury might be doing both parties a favor by trying to get together, and I virtually told them so. If I had thought at the moment that it was a question of liability, I would have refrained from it, but I thought it was a question of the amount."

[8] Silverman v. Travelers Ins. Co., 5 Cir. 1960, 277 F.2d 257, 264.

operative permitted by section 6 of the Clayton Act and by the Capper-Volstead Act. As has been mentioned, the Supreme Court in *Maryland Milk Producers Association v. United States, supra,* has now settled the principle that farmers may act together in a cooperative association, and the *legitimate objects* of mutual help may be carried out by the association without contravening the antitrust laws, but that otherwise, the association acts as an entity with the same responsibility under section 2 of the Sherman Act as if it were a private business corporation.

With that principle in mind, we briefly recapitulate the facts which the jury could reasonably believe from the evidence. During the period in controversy the Association had about 2500 dairy producer members, nearly all located in the North Texas area. About 40 members were located in Oklahoma. The Association supplied about 85 or 90 per cent of the raw milk marketed in the Dallas-Fort Worth Area. Metzger Dairies, Inc. owns and operates a large milk plant in Dallas. Prior to September 1, 1958, Metzger purchased 75 per cent or more of its raw milk supply from the Association and the remainder from individual dairy farmers.

The Association owned and operated surplus milk plants at Muenster and Sulphur Springs, Texas, whose function was to convert milk which could not be sold into condense, cheese, butter and other products which are sold at the surplus or lower price. The operation of these surplus milk plants seems clearly a legitimate marketing function. In the spring of 1961 the Association acquired Vandervoort's Dairy, a milk processing plant in Fort Worth similar to Metzger's plant in Dallas. The damages allowed to Metzger from the increased cost of milk had resulted, however, prior to the time that the Association acquired Vandervoort's.

The Association owned or leased a fleet of refrigerated tank trucks for the transportation of its members' milk from their dairy farms to the various handling plants. Two individuals, C. B. Higgins and Sam Bloss, operated several flat trucks in which they hauled milk in cans from members and nonmembers of the Association to the Metzger plant.

The prevailing price of raw milk in the Dallas-Fort Worth area prior to September 1, 1958 was $5.30 per cwt., the minimum price established by an order of the Federal Market Administrator.[9] September 1, 1958 fell on Monday, Labor Day. On the preceding Friday, August 29, the Association announced by telegram to Metzger and the other milk distributors in the Dallas-Fort Worth area that beginning with deliveries made September 1, 1958 and continuing through February 28, 1959 its price for raw milk would be 30 cents per hundred pounds higher than the price announced by the Federal Market Administrator. The telegram closed with the request, "In the event you do not wish to purchase milk from the Association and/or its members at the quoted price we shall appreciate it if you would notify us immediately."

John Field, who was at the time of the price increase a member of the Board of Directors of the Association, testified that the Board voted to raise the price upon the recommendation of one of the attorneys for the Association, and that:

> "He said that all the handlers on the Dallas-Fort Worth Market or the North Texas Market would pay the price, he was positive, with the exception of possibly Jake Metzger, and that the reason that they would pay it was that the milk was not available elsewhere or out of state."

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[9] See 7 U.S.C. § 608(c) (5); United States v. Rock Royal Co-Operative, Inc., 1939, 307 U.S. 533.

Metzger and three other handlers—Foremost, Borden's and Cabell's—refused to pay the increased price. Within two weeks all of them agreed to pay the increased price. Cabell's President testified:

> "Due to the extreme penalty and cost on most milk being bought from the Midwest, because of transportation costs, and since there had been no change in the resale price of such milk, the company could not remain solvent any longer if such a high penalty was paid for its raw milk supply. The corporation, therefore, capitulated to the demands of the Association."

It was stipulated that Metzger claimed no damages for the period from September 1 to September 13 when Metzger offered to pay the increased price. Metzger's offer was discussed by the Executive Board of the Association and the Association refused to sell milk to Metzger except upon certain conditions, according to the testimony of Board Member John Field:

> "A. Well, there was two fellows hauling milk to Metzger Dairies named Bloss and Higgins that would never lease their trucks to the co-op. And they were hauling milk. And they wanted these two trucks leased.
>
> "Q. Who wanted them?
>
> "A. The co-op.
>
> "Q. All right.
>
> "A. Wanted these trucks leased. And they wanted Mr. Metzger to stop bringing milk in from out of state.
>
> "Q. All right. Was it stated that these were the conditions that had to be satisfied before milk could be sold to Metzger?
>
> "A. Yes."

The Association's response to Metzger's offer to pay the increased price was first made orally by its General Manager, and was reiterated by letter dated September 29, 1958, reading in part:

> ". . . . In order to clear this matter, we thought it might be well to re-state the conditions under which the Association would be glad to resume deliveries to the Metzger plant.
>
> "1. Metzger would pay the same price for milk as are all other handlers in the market—the September Federal Order Class I price plus 30c per hundred through February 1959. No premium would be paid on milk sold in other markets where a premium has not been announced.
>
> "2. Association member milk would be delivered to the Metzger plant in Association owned or leased vehicles — except the Corsicana load.
>
> "3. No additional producers milk would be taken on by the Metzger plant without approval of the Association—the same agreement that has been made with all other handlers in the market."

Metzger refused to accede to those conditions and purchased its raw milk elsewhere at considerably higher prices for the milk delivered at Metzger's plant.

The Association made several ineffective efforts to stop Metzger's alternate sources of supply. It also made an unsuccessful effort to purchase Metzger Dairies. The Association's General Manager at first instructed the broker not to tell Metzger whom he was representing. The broker testified that he met with the President, the General Manager, and several other members of the Association, and heard them discuss why they wanted to purchase Metzger Dairies.

"A. I believe there was a statement made why they wanted to purchase it.

"Q. All right, sir, and what were those statements?

"A. That if they could get Jake Metzger out of the dairy business, they could control the price of milk in this area."

Metzger suffered from boycotts of grocers handling its milk in two counties in which dairying was the principal industry. In Wise County all of Metzger's sales were lost. In Hopkins County Metzger lost a large part of its sales. There was ample evidence to trace these boycotts back to instigation by the Association. The evidence discloses discussion of the boycotts at Board meetings and payment by the Association for a newspaper advertisement signed by a member calling a meeting at which Mr. Connally, a Director of the Association, made a speech.

"Q. And what did Mr. Connally say, as best you recall?

"A. Well, he told us to get Metzger's milk throwed out of the stores and we asked him if it was being worked from all over the territory. It wouldn't do any good to throw it out of Sulphur Springs if we didn't work it all over the territory. And he said it was being worked throughout the territory."

The Association also circulated a letter to its members bearing the signature of John Field, a Board Member calling attention that "Metzger is still shipping in milk from the north and paying up to 75c per hundred more for some of its than is being paid for local milk." The letter concluded: "We would like to urge all members to talk with their friends, neighbors, grocers and business associates and suggest to them that they buy milk from a plant that distributes local milk—not northern milk."

We conclude that the jury could reasonably find from the evidence that the Association engaged in monopolistic practices or attempts to monopolize prescribed by section 2 of the Sherman Act.

The Association insists that the damages awarded by the jury were not justified by the evidence. We do not agree. Within the principles as to proof of damages in anti-trust cases recently restated by this Court in *North Texas Producers Association v. Young*, 5 Cir. 1962, 308 F.2d, 235, 244, 245, there was ample evidence to support the jury's verdict assessing damages at $365,000. Metzger did not seek to recover damages for future loss of profits nor for permanent damage to its business, but supported its claim for actual lost profits by detailed exhibits prepared from its books and records and summarized as follows:

"SUMMARY—Loss of Profit to Metzger Dairies	
"1. Increased Cost of Milk—Sept. 14, 1958 to Oct. 31, 1960	$364,974.42
"2. Profit on Sales Losses, Wise County, Sept., 1958 to June 13, 1963	82,034.24
"3. Profit on Sales Losses, Hopkins County, Oct., 1958 to June 15, 1963	53,389.11
"4. Increased Production, Acquisition Cost, Sept., 1958 to Oct., 1961	10,170.49
"5. Loss on Hauling Operations, Jan., 1959 to Apr., 1963	96,289.31
"Total Loss of Profit	$606,857.57"

The Association annexes to its brief a copy of its motion filed in the district court for judgment notwithstanding the verdict or for a new trial, and in a page and a half of its brief urges reversal for one or more of the claimed procedural errors relied on in the 52 grounds of its motion.

We decline both because the brief fails to comply with Fifth Circuit Rule 24-3(b) and (c) and because we find no procedural error which affects the substantial rights of the parties and necessitates reversal. See Rule 61, Fed. R. Civ. P.

The appellee Metzger complains that the $25,000 fixed by the district court as plaintiff's attorney's fees is low and unreasonable and that the amount was fixed without opportunity for a hearing. However, Metzger's counsel did not request a hearing. Instead, when the district court stated: "The Court will assess an attorney fee in the amount of $25,000. The lawyers have handled this case throughout all of its phases, and I will announce a fee of $25,000," Metzger's counsel replied simply, "Thank you, Your Honor." Moreover, in the absence of a cross-appeal, this Court cannot enlarge the rights of the appellee.[10]

Appellee Metzger also prays that additional attorney's fees be awarded for services relating to this appeal. The statute upon which this action is based provides that the cost of suit include a reasonable attorney's fee, 15 U.S.C. § 15. We fix the sum of $10,000 as reasonable for the services of appellee's attorneys upon this appeal and direct that said sum be included and taxed as part of the costs in this Court.[11]

The judgment is

AFFIRMED.

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[10] The William Bagaley, 1866, 72 U.S. 377, 412; United States v. American Ry. Express Co., 1924, 265 U.S. 425, 435; Morley Co. v. Maryland Casualty Co., 1937, 300 U.S. 185, 191; Helvering v. Pfeiffer, 1937, 302 U.S. 247, 251; Le Tulle v. Scofield, 1940, 308 U.S. 415, 422; Southern Bell Telephone Co. v. Southern Precision Pattern Works, 5 Cir. 1958, 251 F.2d 537, 540; Abel v. Brayton Flying Service, 5 Cir. 1957, 248 F.2d 713, 717; Schildhaus v. Moe, 2 Cir. 1963; 319 F.2d 587, 588; Zellinger v. Uvalde Rock Asphalt Co., 10 Cir. 1963, 316 F.2d 47, 54; 7 Moore, Federal Practice ¶ 72.05 (2d ed. 1953).

[11] North Texas Producers Association v. Young, 5 Cir. 1962, 308 F.2d 235, 246; Twentieth Century Fox Film Corporation v. Goldwyn, 9 Cir. 1964, 328 F.2d 190, 226.

APPENDIX "B"

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

October Term, 1964

No. 20956

D. C. Docket No. 8271 & 8989-Civil

NORTH TEXAS PRODUCERS ASSOCIATION
Appellant,

versus

METZGER DAIRIES, INC.

Appeal from the United States District Court for the North District of Texas.

Before MARIS,* RIVES and BROWN, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, North Texas Producers Association, be condemned to pay the cost of this cause in this Court for which execution may be issued out of the said District Court.

June 21, 1965

Issued as Mandate:

* Of the Third Circuit sitting by designation.

APPENDIX "C"

U. S. COURT OF APPEALS
Filed Jul 16 1965
Edward W. Wadsworth, Clerk

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20956

NORTH TEXAS PRODUCERS ASSOCIATION
Appellant,

versus

METZGER DAIRIES, INC.
Appellee.

Appeal from the United States District Court for the North District of Texas.

(July 16, 1965)

ON PETITION FOR REHEARING

Before MARIS,* RIVES and BROWN, Circuit Judges

PER CURIAM:

The petition for rehearing filed by the appellant in cause is hereby

DENIED.

* Of the Third Circuit sitting by designation.

APPENDIX "D"

AMENDMENT VII TO THE UNITED STATES CONSTITUTION

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

RULE 51, FEDERAL RULES OF CIVIL PROCEDURE

Rule 51. Instructions to Jury: Objection

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he *objects thereto before the jury retires to consider its verdict*, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

RULE 59, FEDERAL RULES OF CIVIL PROCEDURE

Rule 59. New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in

an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) Motion to Alter or Amend Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment. As amended Dec. 27, 1946, effective March 19, 1948.

APPENDIX "E"

DEFENDANT'S MOTION FOR ENTRY OF JUDGMENT

(Number and Title Omitted)

Filed: December 22, 1961

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES North Texas Producers Association, Defendant herein, and moves the Court to forthwith enter judgment in favor of the Defendant upon the following grounds:

I.

Rule 58, Federal Rules of Civil Procedure, provides that "Judgment upon the verdict of a jury shall be entered forthwith by the Clerk". This refers to "general verdicts". In the case of "special verdicts", the Court will direct the proper judgment after motions.

II.

The verdict returned by the Jury in this case of December 15, 1961 was a general verdict as follows:

"We the Jury find in favor of the Defendant

(signed) T. J. Scott, Foreman".

III.

The general charge was requested by the Plaintiff in this case over the objection of the Defendant and since the verdict was against the Plaintiff, he should not now be allowed to delay the "forthwith" entry of judgment for the Defendant.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that upon hearing of this Motion that the Court forthwith sign and enter the form of judgment on the verdict attached hereto.

Respectfully submitted,

ODENEAL & ODENEAL

(Signed) WILLIAM C. ODENEAL, JR.

William C. Odeneal, Jr.
Attorneys for Defendant
Suite 518, 211 N. Ervay
Dallas, Texas RI 1-6473

APPENDIX "F"

MOTION OF PLAINTIFF FOR JUDGMENT NOTWITHSTANDING VERDICT AND IN THE ALTERNATIVE FOR A NEW TRIAL

(Number and Title Omitted)

Filed: December 22, 1961

TO SAID HONORABLE COURT:

Comes now Metzger Dairies, Inc., Plaintiff, and after the jury has returned its verdict, but prior to the entry of any judgment thereon, and herewith presents this Alternative Motion in such connection would show the Court as follows:

I.

Because the verdict of the jury is so clearly against the overwhelming weight of the evidence and so clearly the result of prejudice and bias on the part of the members of the jury, said verdict should be set aside by the Court and judgment entered in favor of Plaintiff on the issue of liability and a new trial ordered on the issue of damages alone. In the alternative the verdict of the jury should be set aside and a new trial ordered by the Court, not only because the verdict is so clearly against the overwhelming weight of the evidence, but also because of mis-conduct of the jury and other errors as hereinafter set forth.

II.

The verdict of the jury in favor of Defendant Association is unconscionable and so clearly against the overwhelming weight of the evidence that same should be disregarded by the Court. Under the evidence adduced during

the trial and the instructions and charge of the Court to the jury, the jury clearly should have rendered its verdict in favor of Plaintiff, the only real question for the jury on the issue of whether Defendant Association violated Section 2 of the Sherman Act (in monopolizing or attempting to monopolize) was one of degree only—that is, the jury should only have considered and determined the extent to which Defendant Association had monopolized or attempted to monopolize trade or commerce. The undisputed evidence and admissions made by officials and other witnesses on behalf of Defendant establish as a matter of law that Defendant had violated Section 2 of the Sherman Act in monopolizing or at least in attempting to monopolize the trade or commerce of raw milk sold in the Dallas-Tarrant County area as set forth in more detail below:

a. As a matter of law, Defendant Association's activities in connection with the boycott of Plaintiff's products in the Wise and Hopkins County, Texas, areas constituted a violation of Section 2 of the Sherman Act. Consider only the following undisputed facts:

1. J. O. Woodman, General Manager of Defendant Association, had full and complete authority in all matters relating to the negotiations with Plaintiff and other handlers and numerous directors of Defendant Association testified that such authority had never been questioned nor had any act undertaken by Woodman on behalf of the Association ever been questioned or repudiated.

2. Under date of September 9, 1958, J. O. Woodman wrote and transmitted to all members of the Association a "Message to Members" in which he recited as a conclusion to such letter, in numbered paragraphs, how members of the Association can help, including the following statement: "Ask your grocer to handle milk from a plant that uses locally produced milk."

3. By approximately September 10, 1958, Plaintiff, Metzger Dairies, Inc. was the only major handler in the Dallas-Fort Worth area who had not agreed to pay the premium price demanded by Defendant Association. J. O. Woodman admitted in his testimony that Metzger offered to pay the premium price on about September 13 or September 15, 1958.

4. A letter was mailed out to members over the signature of John Field, a director of Association, dated November, 13, 1958, on the stationery of Defendant Association, which related that Metzger was the only major handler not now purchasing from the Association and concluded with the following paragraph: "We would like to urge all members to talk with their friends, neighbors, grocers and business associates and suggest to them that they buy milk from a plant that distributes local milk—not northern milk."

5. The meetings of dairy farmers in Wise County, Texas, in early September and in Hopkins County, Texas, in early December considered only the question of any plant who was not then purchasing from the Association, and the only dairy farmers shown to have been present at such meetings were members of Defendant Association. Directors of Association were present, participated and spoke at each of such meetings.

6. Immediately after the Wise County meeting and the Hopkins County meeting, Association members did contact local grocers and at least suggested to such grocers (who were then handling Metzger's milk) that such grocers handle locally produced milk.

7. Immediately following such contacts by members of Defendant Association, some eleven or twelve grocery stores in Hopkins County immediately stopped purchasing any more of Metzger's milk and there was total elimination

of all Metzger's milk in Wise County, Texas, immediately after said meeting.

8. In the November issue of Farm and Ranch magazine and in the November issue of Defendant Association's journal, J. O. Woodman, General Manager of the Association, stated, after reciting that certain handlers had initially "boycotted local milk" that one of the reasons the handlers came back and began purchasing milk from the Association was that such handlers "ran into all sorts of difficulties" . . . and "in addition, our members were out urging their friends and neighbors to buy milk from handlers that bought from them (a counter-boycott!)."

9. The witness John Field testified that there was considerable discussion in board meetings of Association as to the plan or program of working through grocery stores with reference to putting pressure on Metzger and that "there was to be a concerted action in Wise and Hopkins Counties" because of the large number of dairy farmers in those counties, the strong local organizations, etc.

10. The witness Bruce Matthews, who at the time was president of the Hopkins County dairy association, testified that he called the meeting in question at the request of the director of Defendant Association for that county and that he was told by said director that this was a program to be carried out by the Association in other parts of the area against Plaintiff Metzger, said director stating further to witness Matthews that "if we get them deep enough in his pocket" Metzger will have to come around to our way.

11. Many directors of Defendant Association testified that there were considerable discussions at board meetings of the plan of working through grocery stores to get the grocers "to handle locally produced milk" — and this at a

time when Plaintiff Metzger was the only major handler who was not then purchasing milk from Association.

12. Troy Kern, who was then president of Defendant Association, testified "that there was a lot of visiting done" (by members with grocers) and that "the merchants in Wise and Hopkins Counties were very cooperative;" that he personally called on at least two grocery stores who were then handling Metzger's milk and requested that they handle "locally produced milk" and that at least one of said grocery stores immediately thereafter stopped handling Metzger's milk; John Field, who was a director at the time, testified that he personally called on grocery stores and asked them (which were then handling Metzger's milk) to handle locally produced milk; Bruce Matthews testified that he called on grocery stores who were handling Metzger's milk and asked them to handle locally produced milk, and that some of them stopped handling Metzger's milk, and that he further knew that in the Hopkins County area the grocers "were given some pretty strong hints" as to what would happen to their business or patronage by dairy farmers if they did not cease handling Metzger's milk.

There was no real denial by any of the multitude of witnesses produced by Defendant that a boycott of Plaintiff's products took place in Wise and Hopkins Counties, nor that such boycott caused serious financial damage to Plaintiff. The defenses as to this matter offered by Defendant were that the meetings in Wise and Hopkins Counties were not official meetings of Defendant Association, and that there was no official action or Board resolution taken by the Board of Defendant Association authorizing such boycotts. Under the law as declared by Congress and the Supreme Court of the United States, it is respectfully and urgently submitted that the undisputed evidence as above recited as a matter of law is absolutely and complete-

ly a violation of Section 2 of the Sherman Act. The mere fact that the Association, through its General Manager and others, induced its own members not to deal with Plaintiff's products would constitute a violation of Section 2 of the Sherman Act — the fact that the atcion went further, solely and completely through the officials and members of Defendant Association with full knowledge, acquiescence, acceptance and legal ratification by the Board of such Association and moved into the secondary boycott stage of inducing and compelling third parties (grocery stores and Plaintiff's distributor in Wise County, Texas, Floyd W. Stevens) to refuse to handle Plaintiff's products, makes the violation even more flagrant. *Klor's v. Broadway-Hale Stores*, 359 U.S. 207, 3 L. Ed. 2nd 741, 79 Supreme Court 705, and cases cited therein are emphatic in stating that "group boycotts or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category." There the Court pointed out that there is no question of having to prove public injury or price control or substantial effect on commerce. Such action "interferes with the natural flow of interstate commerce. It clearly has by its 'nature' and 'character', a 'monopolistic tendency' ".

b. As a matter of law, Defendant Association is guilty of violating Section 2 of the Sherman Act by the admitted practice of using its control of the milk transportation facilities to eliminate competition (by compelling and inducing non-members of the Association to join the Association in order to get their milk hauled to market). It was strenuously urged by Defendant (and not disputed by Plaintiff) that Association did not act unlawfully in purchasing and leasing trucks to haul its members' milk to market in the Dallas-Tarrant County area. It is undisputed and admitted by the testimony of J. O. Woodman and numerous directors that beginning in about 1957 or 1958

Defendant Association then had control of hauling facilities, and, in fact, had facilities and trucks to haul all milk produced in the north-Texas area to market. It is further admitted and undisputed by Defendant, that after such trucking control was acquired that a number of letters were written to non-members of the Association whose milk had for some years been transported by the Association to market advising such non-members that they must either join the Association or the Association would refuse to haul their milk any longer. Under the instructions of the Court (as set forth in Plaintiff's Requested Instruction No. 4): "The use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage or to destroy a competitor is unlawful." J. O. Woodman admitted that several non-members of Association joined Defendant Association as a result of and after receiving notification as above outlined — which clearly had the effect of removing competition (a non-member milk producer) through the use of monopoly power (in milk transportation facilities).

III.

Each of the above two specific actions (the boycott and the use of the trucking monopoly to exclude competition) are in and of themselves illegal as a matter of law. Each of said activities clearly indicates an attempt and purpose of Defendant to monopolize. Other specific indications of the inescapable legal conclusion that Defendant monopolized or attempted to monopolize are as follows:

a. Control of the available supply of raw milk for Plaintiff and Plaintiff's competitors.

1. J. O. Woodman stated in his article in the Farm and Ranch magazine which was re-printed in the Associa-

tion journal that of the milk produced in the north-Texas area, Association members produced "approximately 90%".

2. In the same article referred to in the preceding sub-paragraph, J. O. Woodman stated "the price of the milk that they shipped in from outside the state cost considerably more laid down in Dallas than what we'd ask them for our milk; the quality of the milk they brought in was poor; they ran into all sorts of transportation difficulties (by rail it was costing them 34.9¢ a gallon!) and they were losing sales to their competitors who were paying our prices."

b. The covert attempt to purchase Plaintiff corporation by Defendant. It will be recalled that the undisputed testimony of the witness Manering is that an official of Association stated in his presence in connection with the discussion when Association was attempting to purchase Plaintiff corporation that "if we can get Metzger out of the milk business, we can control the price of milk".

c. The refusal of Defendant to sell raw milk to Plaintiff unless Plaintiff agreed not to purchase from other outside sources without prior approval of Defendant Association. J. O. Woodman's letter to Jacob Metzger, dated September 29, 1958, explicitly states such proposition as a condition precedent to Association's agreement to sell milk to Plaintiff Metzger. The witness Abe Richeson, a director of Defendant Association, testified that he conferred with Mr. Metzger and told him "We wanted to sell him all the milk."

d. The purchase and use by Defendant Association of surplus milk plants and the Vandervorts plant in Fort Worth for the obvious purpose of increasing the leverage and bargaining power of Association in the sale of raw milk and enhancing its already considerable financial resources.

IV.

The jury was guilty of mis-conduct in its deliberations as evidenced by the affidavit attached hereto from the Juror Lorch. The following particulars relating to such mis-conduct will be noted:

a. The explicit admonition and instruction of the Court was ignored and violated by consideration of the statement attributed to Mr. Jacob Metzger that he did not like unions "monopolize" and also by the terms "attempt to monopolize". It is obvious that the members of the jury did not take into account the restricted area of commerce as defined by the pleadings and instructions of the Court and that the jury considered that for Defendant Association to monopolize it was necessary that it have complete and total control 100% of all milk in the United States which could be brought into Dallas for re-sale at any price whatever. It is clear that the jury assumed that no monopoly could be obtained even if (as the evidence clearly indicates) Defendant Association controls the vast majority of all milk available to Plaintiff and Plaintiff's competitors at competitive prices and in necessarily substantial quantities and from reliable sources. In connection with the attempt to monopolize, it is clear also from the statements of members of the jury that they completely ignored the instructions of the Court and definitions included in the Court's charge and based their verdict on their own personal opininos that it was all right if Defendant Association attempted to monopolize and they would hold in favor of Defendant as long as it was not proved to their satisfaction that a complete monopoly had been achieved.

f. The discussion by members of the jury that any damages awarded would be trebled is contrary to the instructions of the Court.

Each and all of said acts of mis-conduct were prejudicial to Plaintiff and injury to Plaintiff clearly resulted.

V.

The Court committed error in failing to advise counsel in advance of the arguments to the jury as to the contents of the charge and instructions which the Court proposed to give to the jury. (Federal Rules of Civil Procedure, Rule 51).

VI.

The Court erred in granting the requested special instructions of Defendant relating to boycott, particularly No. 1-b, 1-c for each and all of the reasons contained in Plaintiff's objections and exceptions to the Court's charge which are a part of the record of this case and to which reference is hereby made for all purposes.

VII.

The Court erred in granting Defendant's requested special instruction No. 1-f, relating to the letter of September 29, 1958, from J. O. Woodman to Jacob Metzger, for each and all of the reasons contained in Plaintiff's objections and exceptions to the Court's charge and for the further reason that as the affidavit attached hereto clearly indicates such instruction was in fact confusing and misleading to the jury and/or gave the jury an opportunity by reason of prejudice and bias to completely disregard said letter.

VIII.

The Court erred in permitting Defendant's witness Murphy over objection, to testify as an expert on the ultimate issue of why Defendant did not have and could not have a monopoly and also on the ultimate issue of why there

was and would continue to be competition and/or that Defendant would be unable to exclude competition.

IX.

The Court erred in admitting into evidence over objection Defendant's Exhibits No. 4, 5, 6 and 7 for each and all of the reasons stated in Plaintiff's objections to the admission of said Exhibits.

X.

The repeated reference by Defendant's counsel to other litigation between or involving the parties to this suit and allusion to statutes of the State of Texas which litigation and statutes had been clearly and explicitly excluded by the Court in pre-trial from Defendant's pleadings was calculated to, and did prejudice Plaintiff's rights to such an extent that a new trial should be ordered. The innuendoes, insinuations and direct statements with reference to such other litigations and such statutes which were not contained in Defendant's pleadings was so clearly calculated to prejudice Plaintiff's rights that a new trial should be ordered.

XI.

Error was committed in delivery to the jury for its deliberation of the Federal Marketing Order. The offering of such exhibit to the jury (and as the attached affidavit indicates the use thereof by the jury) implied that the jury should undertake to construe such complicated legal document and arrive at their verdict based upon their legal in-

terpretation of same, all of which was clearly improper and prejudicial to the rights of Plaintiff.

WHEREFORE, for each and all of the reasons stated above and set forth herein, Plaintiff prays that the Court disregard and set aside the verdict of the jury in this cause and enter judgment as to liability in favor of Plaintiff and order a new trial on the issue of damages alone; in the alternative, Plaintiff prays that the verdict of the jury be set aside and that a new trial be granted.

Respectfully submitted,

STOREY, ARMSTRONG
& STEGER
2700 Republic National Bank
Building
Dallas 1, Texas

(Signed) CHARLES P. STOREY
Attorneys for Plaintiff

AFFIDAVIT

STATE OF TEXAS)
)
COUNTY OF DALLAS)

BEFORE ME, the undersigned authority, on this day personally appeared JAY W. LORCH, who, after being by me duly sworn on oath, stated as follows:

That I was a member of the jury in the trial of Cause No. 8271, styled Metzger Dairies, Inc., vs. North Texas Producers Association, which was presented in the Federal District Court for the Northern District of Texas, beginning December 4, 1961. The jury received the instructions and charge from the Court on December 14, 1961, at approximately 12:30 P. M. and following a recess for lunch began deliberation at approximately 1:30 P. M. The Marshall brought to us all exhibits which were introduced into evidence for our use during our deliberation.

Within 20 or 30 minutes after our deliberations began, one juror remarked that Mr. Metzger had said that he did not like unions and did not like to deal with an organized group of farmers and that Mr. Metzger was just a hard-headed man. This juror further stated that, in his opinion, he saw nothing wrong with the way the Defendant (North Texas Producers Association) handled their price increase (on September 1, 1958) and further remarked that "in my union we wouldn't have been that nice about it." The juror who made this statement is a member of a union.

The charge of the Court and the instructions of the Court were read aloud after the first vote, to the best of my memory, but little reference was made to those instructions and that charge thereafter by the majority of the members of the jury during the deliberations and discussions during the next day and a half. In discussion of

the issue of monopoly or whether the Defendant had monopolized, there was no discussion on the specific question as to whether the Association had power to control or determine prices nor was there any discussion on the specific question as to whether the Association had power to exclude competition. On the question of monopoly, one juror commented that there was nothing wrong with what the Defendant had done; that this is the way business must be conducted today; that just like paying income taxes and claiming every deduction possible you go as far as you can within the limits of the law; that he personally would like to have a monopoly and that maybe what the Defendant had done and was doing was heading in that direction but that, since the Defendant did not yet have a complete monopoly, there was nothing wrong and their actions constituted only good business.

The statements referred to above and referred to hereafter in this affidavit were made audibly to me and within the hearing of all jurors since throughout our discussions the foreman conducted the deliberations so that with minor exceptions, only one person was talking at a time and was making his remarks to the entire group.

On the question of monopoly it was stated more than once and, as I recall, by more than one juror, that the Defendant Association obviously has no monopoly because milk is always available — "look at all the surplus milk in the United States." These various remarks with reference to milk available from sources outside the North Texas area were not made in connection with any discussion or consideration of the price of milk or the cost of transporting same into Dallas.

Statements were made by members of the jury that there are fewer farmers in the United States today than there ever have been; that only 5% of the people who

voted in the last election were farmers and that probably only 2% were dairy farmers; that farmers are, by nature, individual thinkers, and because of this and the small number, they could never get together and get a monopoly.

It was stated by one juror that dairy farmers were not doing well financially. One juror stated that he personally knew that dairy farmers were poor credit risks to banks.

Early in our deliberations the question was asked by one juror as to how the Defendant would pay any judgment in favor of Metzger and that "you know they are going to pass it on to the farmers."

The statement was made that farmers in the United States obviously could never get a monopoly, but on the other hand, Metzger, Borden and Foremost and the other big handlers could get together, and if they did and made the Defendant Association come around to their price, these big handlers could have a monopoly, set any price they wanted to and jack up the price of milk to the consumer.

Comments were made on several occasions that any damages awarded would be trebled.

On the question of boycott in Wise and Hopkins counties, it was stated by one or more jurors that there was no boycott by Defendant since the "message to members" by J. O. Woodman and the "John Field letter" did not use the word "boycott"; that since attorney Harold Nelson had given the Board of Defendant Association legal advice concerning boycotts that this showed "they were trying to do right," and therefore he knew that the Defendant did not boycott; that, since "no official action" was taken by the Board of Directors of Defendant Association, there was no proof that any boycott was with the approval of the Association. One other juror stated, "You don't have to

tell a bunch of grocers which side their bread is buttered on; they are going to do what is best for the dairy farmers if they keep the dairy farmers' business."

There was no discussion by the jury as to what actually constitutes a boycott. There was no discussion as to ratification of any boycott by the Defendant Association.

One juror stated that even if the members of Defendant Association called on grocers who handled only Metzger's milk and asked that they handle milk from one who purchases raw milk from Defendant Association and stated, "I am sure you are going to try to please all of your customers" that this was alright even though those grocers did all stop handling Metzger's milk.

There was considerable discussion with regard to the letter of September 29, 1958, from J. O. Woodman to Mr. Jacob Metzger. The discussion primarily centered upon whether that letter stated conditions or whether it was only "bargaining, or horse trading." One juror stated that when you drive a hard bargain you don't say in a letter that you will give in on any points, but since the September 29 letter made an exception would be made. It was stated several times that this letter did not close the door to further negotiations, and therefore this was a "bargaining letter," and we should not consider it. There was no discussion as to whether this letter constituted an offer to compromise but only a discussion as to whether it stated conditions or was bargaining.

With reference to the letter of September 29, there was no discussion as to whether the testimony or other evidence showed that conditions were or were not in fact placed upon Metzger. Further as to the September 29 letter, there was extensive discussion as to whether the words "producers milk" in that letter indicated exclusion of milk from those

defined as "producers" under the Federal Marketing Order or only "other source milk" as defined in such marketing order. The Federal Marketing Order was read and examined and discussed. At least one juror stated that since under the Federal Marketing Order definition, the September 29 letter did not exclude "other source milk," there was nothing wrong with such a condition in that letter since it did not exclude purchase of milk by Metzger from out of state.

Several members of the jury are farmers, and the majority of the members of the jury live in small farming communities.

The jury was divided 8 to 4 in favor of Defendant from the time the first vote was taken until approximately 3:00 P. M. on December 15, 1961, the second day of our deliberations. I was one of the 4 who had voted consistently in favor of the Plaintiff. After the note was sent from the jury to the Judge saying that we were unable to reach a decision, the Judge called all of us in to the court room and told us to retire and continue to deliberate and that he hoped a decision could be reached. As a result of the statements made by the Judge, I and the others who had voted consistently for the Plaintiff finally agreed to go along with the majority so that the case would not result in a hung jury.

SIGNED this 21st day of December, 1961.

(Signed) JAY W. LORCH
JAY W. LORCH

SWORN TO AND SUBSCRIBED before me this 21st day of December, 1961.

(Signed) DONALD A. SWANSON, JR.
Notary Public in and for
(SEAL) Dallas County, Texas

APPENDIX "G"

ORDER GRANTING NEW TRIAL

(Number and Title Omitted)

Filed: January 16, 1962

On this 16th day of January, 1962, came on to be heard the following motions filed herein after the Jury returned its verdict: Defendant's Motion for Entry of Judgment and Plaintiff's Motion for Judgment Notwithstanding Verdict and in the Alternative for a New Trial, and the Court having considered such motions and having heard argument of counsel and being fully advised, it is

ORDERED, (1) that Defendant's Motion for Entry of Judgment be denied; and it is further

ORDERED, (2) that the motion of Plaintiff for Judgment notwithstanding verdict be denied; it is further

ORDERED, (3) that the motion of Plaintiff for new trial be granted on the grounds that, considering the evidence as a whole and weighing it, the Court is of the opinion that the verdict of the Jury is wrong and is contrary to the weight of the evidence, and for the further reason that the Court is of the opinion that error was committed in statements made by the Court to the members of the Jury after the Jury had indicated in writing that they were unable to reach a verdict, which statements by the Court had the effect of coercing the verdict.

It further appears to the Court that Civil Action No. 8989, styled North Texas Producers Association vs. Jacob

Metzger, et al, now pending in the United States District Court for the Northern District of Texas at Dallas, involves common questions of law and fact with this cause and, it is

ORDERED that Civil Action No. 8989 be consolidated with this Civil Action No. 8271.

SIGNED AND ENTERED this 16 day of January, 1962.

(Signed) T. WHITFIELD DAVIDSON
United States District Judge

APPROVED AS TO FORM:

STOREY, ARMSTRONG & STEGER
/s/ CHARLES P. STOREY
Attorneys for Plaintiff

ODENEAL & ODENEAL
/s/ WILLIAM C. ODENEAL, JR.
Attorneys for Defendant

APPENDIX "H"

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

METZGER DAIRIES, INC.

versus Civil 8271

NORTH TEXAS PRODUCERS ASSOCIATION,
J. O. WOODMAN, TROY E. KERN, and
FLOYD M. DOYLE

Filed: January 22, 1962

JANUARY 16TH, 1962

THE COURT:

Let us review this case. It is an important case. Let us take first the farmer. I am in position to understand just about how the farmer looks at things. Those of you who have read my opinion in the wheat case will remember how I regard the farm. I was born on a farm. I drove up the calves, I dropped the corn, I scattered the cottonseed, I plowed, I have split more rails than Abraham Lincoln ever did, perhaps twice as many. So I know what the farmer goes through.

You don't have to be told, but you can ride through our industrial districts. There you will see the homes nicely painted or brick homes, but when you get into the agricultural areas you find only a few homes that are nice, and you will find in many cases the money to build them came from some other source, and that fact may begin to make

you feel that the farmer is not getting his. Just who is responsible is another thing, but what I have said is manifest.

Now, there are certain things that are calculated to impress a jury, that may cause them to lean one way or the other.

I was just reading a story where some people in Australia imported some camels down there, and they were not useful and they were turned out to be wild. A horse or cow will jump over a fence, but a camel leans up against a fence, and another one and another one, and then so many lean against a fence it will fall down, and then the whole camel herd can walk through.

But let us state a case. That is close to the heart, that is inclined to make us, as human beings, overlook the law and override the evidence. Take a case where on a railroad company a man was hurt and from that injury he died immediately, and he leaves a wife with three or four children without any support, and it is mighty few men that, if they are on the jury, won't let that situation influence them and give the plaintiff the benefit of the doubt in every point along the line. They will do it, and you can't stop them.

So now, in this case, you have a group of men who, to all appearances are farming people, are not getting theirs, so they organize, as the law permitted them to do and as was their right to do, to try to get something more that was theirs. And when they had organized the managers of the organization proceeded to do something for them to try to overcome the hardship under which they had to labor as farmers, and dairymen, we will call farmers.

This organization embraced a group of counties in North Texas, Fort Worth and Dallas being the center, extending east to Hopkins County and west to Wise County and down to Mavarro County.

The particular organization fell into very energetic hands. I will say as a compliment to Mr. Woodman, that when it comes to being an organizer and getting results, whether his company did any monopolistic act or not, you can just follow his tracks, and if I was going to organize a monopoly on a large scale, I would want his aid and advice and direction. He knows every turn, and just where to go and what to do. He ought to command a salary, if he was in a concern that would pay it, of an hundred thousand dollars, like some of these larger companies.

But let us see what happened. This organization—in unity there is strength—and when all these farmers are put together, I think a good illustration is where an old man had seven sons that were not pulling together, and he had them to come before him and he had a bundle of sticks that he had tied together, and he offered to reward any of his sons that could break that bundle. None of them could do so. And yet, the old man said, "I can do it." And he unbound them and took each stick, one at a time and broke them without any trouble. So in union there is strength.

This union having been organized collected the dues and profits which originated from the organization. It was said that it was a non-profit organization, but notwithstanding the profits grew, they had money to buy dairies, they bought a Fort Worth dairy, and I believe a Sulphur Spring dairy, and it was ready and able to buy the plaintiff's dairy for three or four million dollars. They sent a man to try to buy it. A great amount of funds were accumulating into the hands of these farmers.

Now, even though they were farmers, just like the labor union, and they have been given certain aids from the Government, until they are not always the underdog by a good deal.

When I was Lieutenant Governor, my sympathy always ran with Labor. The Railroad Engineers made my office their headquarters, and I helped them draw the bills that were introduced into the Legislature. I felt at the time that they were the underdog.

The unions are no longer the underdog, so to speak. They are in position, by reason of their strength to tell the other fellows where to head in. That was the purpose of the law, to give them equal opportunity.

Now, after this union had acquired the strength that it possessed, they decided to raise the price of milk, which they had a right to do, and it collected the milk of these farmers and would sell it to the distributors. It could have done the distributing itself, but others undertook to do the distributing.

So the plaintiff, Metzger, was one of the distributors, and Borden and others were distributors. They were buying milk from the union association and then distributing it to the users. When the union decided to raise the price to these men who were buying milk, it was either up to these men who were buying to buy or not buy. Several of them refused to pay the price, but seeing what they were up against they decided they would pay the price. Mr. Metzger said, "No, I don't think I have to pay that price. It is arbitrarily raised and I don't think I have to pay it." And the union said, "We think you will have to." And in a little while the merchants that had been buying milk from Mr. Metzger, the distributor, and selling to their customers quit buying, particularly in Wise County, and Hopkins County. In a little while those that had been operating trucks hauling the milk from the farmers to the plant all went out of business. The union had the power—the farmers, they were. They should not have oppressed another,

when they were organized, but it is hard for us not to exercise power when it is put in our hands.

There is a great deal of evidence in this case, as I said, to indicate the presence of a monopoly.

For instance, counsel called attention to the article that Mr. Woodman wrote, setting forth his achievements. Some of the evidence indicated that they virtually said to Metzger, "You will either pay our price or get out of business." And after they began to get him, "over the barrel" they sent a man to buy his plant. He didn't buy it. But the situation was the cord was drawn tighter on him. He finally brought this suit alleging what has happened.

Now, I thought when the jury was hung, that after so long a trial and so much involved, and the labor and expense of another trial, that the jury might be doing both parties a favor by trying to get together, and I virtually told them so. If I had thought at the moment that it was a question of liability, I would have refrained from it, but I thought it was a question of the amount.

There was another thing along that line that, of course, I am sure must have influenced the jury, and it influenced the trial court, and that was the three-way penalty. That is one of the harsh provisions of the law, to penalize a man who may not have been criminal in his actions and put a three-way penalty on him. Thus, if a verdict had been rendered for something over $500,000, the judgment on that verdict would have been for over one million dollars, a million and a half or better. The thought was in our mind that that verdict would be a very harsh verdict, and how to prevent it when it was mandatory, I saw but one way. If they had brought in a large verdict, it was in my mind to say to the plaintiff that this is a mandatory provision of the law, and would make the verdict beyond what

is reasonable, and before I would put the mandatory verdict on the defendant, I would have wanted the plaintiff to remit. The jury had no knowledge of the fact that it might be reduced or cut down, and they couldn't help but see that point, that their company, their organization of farmers, who had organized themselves to protect themselves and had organized under the law, were going to be virtually put out of business on a judgment three times the amount of the damage that was done.

I am not satisfied with the result of it.

As I said, I feel like that the Court perhaps was in error in pressing the jury for a verdict.

Taking that into consideration and the other things I have mentioned into consideration, we come down now to what would happen in a new trial, whether we grant a new trial or not, we will have to go over this thing again, and another suit has been brought which charges the plaintiff Metzger with doing all the things that he charges the defendants with doing, and when we try that case we are going right back over the same field and the same law, and the same line of witnesses that we have already gone over.

The Court has in mind, therefore, to grant a new trial in this case and consolidate it with the other case that is yet to be tried. And will so order.

APPENDIX "I"

DEFENDANT'S ALTERNATIVE MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT FOR A NEW TRIAL

(Number and Title Omitted.)

Filed: July 8, 1963.

TO SAID HONORABLE COURT:

NOW COMES the defendant, North Texas Producers Association, and pursuant to Rule 50(b), Federal Rules of Civil Procedure, files and presents herewith its Motion to disregard the verdict returned herein on June 27, 1963, and to render Judgment herein for the Defendant in accordance with its Second Motion for Instructed Verdict presented to the Court and overruled by the Court at the close of all of the evidence and to grant the Defendant a Judgment Notwithstanding the Verdict based upon and for the following facts and grounds:

MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT

I.

NO PUBLIC INJURY

The undisputed and uncontroverted evidence shows no injury to the public. The core of this case is the right of the Defendant to price its product and to haul its product. At various times during the trial, Plaintiff admitted that Defendant had these rights. However, the only inference that can be drawn from the evidence is that Plaintiff first refused to deal with Defendant on September 1, 1958 because he refused to pay the price that Defendant had fixed for its product and that he subsequently refused to deal with the Defendant because he simply would not agree for

Defendant to haul its product. These are matters of private dispute between Plaintiff and Defendant and certainly demonstrate no harm to the general public.

II.

NO INTERSTATE COMMERCE

Plaintiff's own pleadings restrict the area of commerce to "the marketing of raw milk in the Dallas-Fort Worth area". As to the marketing of raw milk in the Dallas-Fort Worth area, the Defendant is simply not engaged in interstate commerce. The only milk that the Defendant markets in said area is produced in forty counties located in the State of Texas. The undisputed evidence is that the member milk produced in the three Oklahoma counties is never marketed on the Dallas-Fort Worth market.

III.

NO RESTRAINT ON INTERSTATE COMMERCE

In any event, there was no showing of even slight restraint on interstate commerce. Note that the Defendant is a Capper-Volstead type cooperative, which can legally acquire even 100% of the market without being in violation of the Anti-Trust Laws.

IV.

NO MONOPOLY

The undisputed evidence shows that there is no monopoly in the area of commerce defined by Plaintiff and that there could not possibly be any such alleged monopoly. Consequently, no cause of action is demonstrated for monopoly or an attempt to monopolize, leaving this Court without jurisdiction of Plaintiff's alleged claim. The uncontroverted evidence demonstrates competition in the

marketing of raw milk in the Dallas-Fort Worth area and an actual increase in such competition during the period of this dispute. During this controversy, Plaintiff has purchased large volumes of raw milk from outside the State of Texas for sale on the Dallas market. So has Foremost Daries. Another agricultural marketing cooperative, to-wit, Independent Dairyman's Association has been formed during this dispute and markets all of its milk on the Dallas market. Lamar Creamery Association is another agricultural marketing cooperative located at Paris, Texas, which markets a substantial amount of milk on the Dallas market. Further, there are milk farmers in the North Texas market who do not belong to any marketing association who market their milk on the Dallas market. The undisuted evidence is that the presence of tremendous volumes of surplus milk on numerous adjoining markets makes it impossible for Defendant to price its product in excess of the reasonable value thereof. Should Defendant price its milk above the reasonable value thereof, the surplus milk from adjoining markets can be immediately sold on this market. Further, the minimum price of raw milk is fixed and determined by Federal Milk Marketing Order No. 43. Thus to a very great extent and for all practical purposes, the price that the farmer receives for his milk is closely regulated. As closely regulated as the industry is under the Federal Milk Marketing Order, there could be no monopoly, particularly in view of the provisions of the Capper-Volstead Act, which authorize the Secretary of Agriculture to obtain a cease and desist order against any cooperative which unduly enhances the price of milk.

V.

NO REFUSAL BY DEFENDANT TO SELL MILK

The Defendant never refused to sell milk to the Plaintiff. Actually, Plaintiff has received member milk at its

plant during every month of every year of this controversy. Plaintiff's own evidence and exhibits demonstrate this. Plaintiff makes the point that such milk during 1959 and subsequent to September 1, 1958 and until November 1960 was milk purchased directly from members of North Texas Producers Association rather than *through* such Association. This simply spotlights the true core of the Plaintiff's position: That it disputes the right of the Defendant to haul its product.

VI.

NO CAUSAL CONNECTION

The undisputed evidence demonstrates that there is no causal connection between the damage claimed by Plaintiff and the alleged monopoly or attempt to monopolize by Defendant. Since Defendant never refused to sell milk to the Plaintiff at the same price sold to the other milk companies in the Dallas market, Plaintiff simply had no right to go purchase milk out of state at a greater price and try to hold Defendant liable for such excess cost. If Plaintiff had continued to purchase milk from the Defendant, it would not have incurred any excess milk costs and would not have sustained any of its alleged losses and would have continued to market its milk in Hopkins and Wise Counties. This is the missing link in Plaintiff's case. It requires speculation as to the *fact* of damage, which defeats Plaintiff's whole case as a matter of law. This further points up that there was no public injury, no restraint of interstate commerce and no violation of the Anti-Trust Laws by the Defendant. Also that this was purely a private dispute.

VII.

ANTI-TRUST LAWS

Throughout the trial, Plaintiff constantly prejudiced Defendant's rights and position by referring to matters of

discrimination and conditions that were imposed upon Plaintiff but not upon Plaintiff's competitors. These matters could only relate to alleged violations of Section 2e and Section 3 of the Clayton Act. Then Plaintiff waived and abandoned all sections of the Clayton Act and stood only upon the alleged violation of Section 2 of the Sherman Act. For the reasons stated above, there was no monopoly and, hence, no violation of Section 2 of the Sherman Act. Hence, there are no violations left to sustain a judgment against this Defendant.

VIII.

INSUFFICIENT PROOF OF DAMAGE

Plaintiff's proof as to the amount of alleged damages is insufficient as a matter of law since an improper period of damage has been used by the Plaintiff as to the issue of alleged monopoly. As to excess cost to purchase milk, Plaintiff uses the period September 14, 1958 to November 1, 1960. Plaintiff used such closing date as being the date that it resumed purchases of supplemental loads of milk pursuant to the offer made by W. T. Crouch (President of North Texas Producers Association) made on *July 14, 1960*. The date the offer was made should be controlling. The beginning date of September 14, 1958 was arbitrarily fixed by Plaintiff as the date that he *offered* to purchase milk from Defendant at premium price. If the *offer* fixes the beginning date, then the *offer* should fix the ending date. Plaintiff urged various other items of damage in connection with excess cost to purchase milk. Additional field expense, telephone expense, automobile expense, trucking operation losses, etc. These were all computed with varying termination dates, all of which being *later* than November 1, 1960. The purported damages are so speculative and based upon such conflict and confusion as to the alleged period of damage as to be legally insufficient to support the verdict or any judgment entered pursuant thereto.

IX.

SECTION 6, CLAYTON ACT AND CAPPER-VOLSTEAD ACT

The Defendant obviously qualifies for all of the immunities and exemptions provided by said Acts. The Capper-Volstead Act provides that if a cooperative unduly enhances prices by reason of monopoly the Secretary of Agriculture has an exclusive right of action to enforce a cease and desist order through the United States District Court. No private right of action is given.

ALTERNATIVE MOTION FOR A NEW TRIAL

And only in the alternative that the Court denies Defendant's foregoing Motion for a Judgment Notwithstanding the Verdict, Defendant moves the Court to set aside the verdict rendered herein on June 27, 1963 and the Judgment rendered thereon on June 27, 1963 and to grant the defendant a new trial herein upon and for the following grounds:

I.

The Court erred in overruling Defendant's Motion for Production of Documents and Records as to Paragraph VI thereof, which requested legitimate discovery information from the Plaintiff, which would have given Defendant an opportunity to obtain evidence on one of the primary defensive issues in this case, to-wit, that the Plaintiff, acting through Jacob Metzger, has at all times material hereto solicited the membership of the Defendant Association, which is something that no other processor does, so that in truth and in fact it is the Plaintiff that discriminates against the Defendant. Defendant should have been given access to the information requested in Paragraph VI of said Motion and in refusing such information to the Defendant, the Court has deprived Defendant of a substantial right in this case.

II.

The Court erred in overruling Defendant's Motion for Production of Documents and Records as to Paragraph VIII and IX thereof in which Defendant was seeking access to Plaintiff's records of all correspondence and contact with other associations and cooperatives as to negotiating for the purchase of raw milk and to the same information as to Plaintiff's dealings with independent producers, since such information would be reasonably calculated to provide evidence of the conspiracy participated in by the Plaintiffs, Jacob Metzger and Metzger Dairies, Inc., both as to the defense to Plaintiff's suit in showing that the Plaintiff actually discriminated against this Defendant and as to Defendant's subsequent Cross-Action to indicate the conspiracy complained of there. That such request by the Defendant was reasonable and timely made and presented to the Court, and the failure of the Court to allow Defendant access to such information deprived Defendant of a substantial right in the preparation for the trial of this case.

III.

The Court erred in sustaining Plaintiff's objection to Defendant's Interrogatory No. 2 propounded to the Plaintiff, Metzger Dairies, Inc., which sought to discover the total volume of milk received from each county and from each state by the Plaintiff from producers under Order No. 43 for the reason that the information sought was reasonably calculated to provide information and evidence vitally material to the issue of Plaintiff's alleged damages in that an analysis could have been made from these figures which would have greatly decreased the alleged damages. Said Interrogatory was propounded by Defendant to the Plaintiff in a timely manner and in sustaining Plaintiff's objection to said Interrogatory, the Court has deprived Defendant of a substantial right and a fair trial.

IV.

The Court erred in sustaining Plaintiff's objection to Defendant's Interrogatory No. 4 propounded to the Plaintiff, Metzger Dairies, Inc., which sought to discover vital information as to the volume, unit price, gross price, credits and rebates, etc. concerning all Class I milk disposed of by Plaintiff during the period of alleged damage for the reason that such information was vital to the proper preparation of a defense on the issue of damages and it can be reasonably assumed that such information would lead to evidence indicating that Plaintiff's own trade practices contributed to its loss both as to the alleged loss of profits in Wise and Hopkins Counties, the loss of retail outlets and general loss of profits, if any.

V.

The Court erred in sustaining Plaintiff's objection to Interrogatory No. 6 propounded by the Defendant to the Plaintiff, thereby depriving the Defendant of information and evidence vital to the defense on the issue of Plaintiff's alleged damages. Said Interrogatory sought to develop facts and information for the period of alleged damage, which would show the sales expenses incurred by Plaintiff in acquiring wholesale Class I milk accounts and could reasonably be expected to produce evidence to the effect that any loss sustained by it could have been caused by its own trade practices. Said Interrogatory was timely propounded under the Rules and the Court's refusal to allow Defendant the information inquired about was error and substantially prejudiced Defendant's position in the preparation and presentation of its defense.

VI.

The Court erred in sustaining Plaintiff's objection to Defendant's Interrogatory No. 11 propounded to the Plain-

tiff seeking to discover the name and address of each dairy farmer presently or formerly a member of the Defendant who had been contacted by any representative of the Plaintiff for the purpose of purchasing said farmer's milk during the period of alleged damage since such information was vital to the defense, it being the position of the Defendant that the Plaintiff constantly solicited Defendant's members to sell milk directly to Plaintiff (thereby breaching said member's marketing contract with Defendant) or to resign from the Association, all of which actions would be discriminatory toward the Defendant since no other processor in the market treats Defendant in this manner. The point being that the Plaintiff cannot complain of being discriminated against on the one hand while on the other hand he is aggressively treating the Defendant in a discriminatory manner. Further, such information would go to the heart of Defendant's Cross-Action. Said Interrogatory was timely propounded under the Rules and should have been answered by the Plaintiff, and in assisting the Plaintiff in keeping its records secret in this connection the Court has committed error and deprived Defendant of a substantial right.

VII.

The Court erred in overruling Defendant's First Motion for an Instructed Verdict presented on December 8, 1961 after the Plaintiff has rested its case and before the Defendant had presented any evidence for the reason that the pleadings and the record of evidence before the Court at the time said Motion was made and presented showed conclusively that Plaintiff was not entitled to a recovery as a matter of law. For the purpose of this Motion for a New Trial, Defendant adopts said First Motion for an Instructed Verdict herein by reference to the same as it appears in the record of the first trial as though fully set out

verbatim. The failure of the Court to grant said Motion and to award a judgment to the Defendant was a substantial and prejudicial error.

VIII.

The Court erred in overruling Defendant's Second Motion for an Instructed Verdict presented to the Court at the first trial of this case after both parties had rested and closed their evidence for the reason that the pleadings and evidence before the Court at the time said Second Motion for an instructed Verdict was made showed conclusively that Plaintiff was not entitled to any judgment or recovery as a matter of law. For the purpose of this Motion for New Trial, Defendant adopts said Second Motion for an Instructed Verdict by reference as the same appears in the record of the first trial as though fully set out verbatim.

IX.

The Court erred in granting Plaintiff's Motion to Strike Certain Portions of Defendant's Answer to Plaintiff's Third Amended Complaint, especially insofar as said action by the Court ordered the deletion of all of Paragraph III, C of "Answer of Defendant North Texas Products Association to Plaintiff's Third Amended Complaint" since such allegations of the Defendant were true and could be proved by the introduction of a certified copy of the Judgment of Temporary Injunction entered in Cause No. 40450-A, North Texas Producers Association vs. Jacob Metzger, et al, 14th District Court, Dallas County, Texas, and particularly since the subject matter of such allegations went to the discriminatory manner in which Plaintiff treated Defendant at all times material hereto, and further went to Defendant's theory that it had always been Plaintiff's intention to destroy the Defendant Association. Said allegations showed, and Defendant should

have been allowed to tender proof thereunder, that Plaintiff had carried out a systematic plan and design to destroy the effectiveness of the Defendant Association.

X.

The Court erred in sustaining Plaintiff's objection to the Temporary Injunction entered by the Court in Cause Number 40450-A, North Texas Producers Association vs. Jacob Metzger et al, 14th District Court, Dallas County, Texas on January 2, 1959, thereby excluding such Judgment (Exhibit No. —) and depriving Defendant of its right to properly defend this case on the theory that Plaintiff's purpose and intent was to dsetroy the Defendant Association and to discriminate against it in very way so that said Defendant would have been justified in imposing conditions upon Plaintiff, if it, in fact, did impose any conditions.

XI.

The Court erred in overruling Defendant's Motion to Dismiss for Failure to State a Claim, which was directed to Plaintiff's Third Amended Complaint herein and which said Motion was considered by the Court at a Pre-Trial Hearing on November 10, 1961 and overruled by the terms of a Pre-Trial Order signed and entered pursuant to such Hearing. Such Motion should have been granted and sustained and a judgment thereupon entered in favor of the Defendant since the Complaint showed on its face that there was no public injury, no restraint of interstate commorce, no interstate commerce involved, no violation of the Anti-Trust Laws, no causal connection between the alleged violations and the alleged damages, speculation as to the "fact" of damage and that a complete improper measure of damage was being asserted by the Plaintiff. The only proper measure of damage would have been for the Plaintiff to have dealt with the Defendant (alleged monop-

olist) and then sued for damages based upon the difference between Defendant's prices and conditions and the market value of the milk. The Court's failure to grant this Motion deprived Defendant of a substantial right.

XII.

The Court erred in granting the Plaintiff a new trial herein on January 16, 1962 and setting aside the verdict returned by the jury in the first trial of this cause on December 15, 1961 in favor of the Defendant, North Texas Producers Association, for the reason that said verdict was just and proper under the record and was supported by the evidence and should have been allowed to stand. Although the charge submitted to the jury was erroneous and prejudicial to the rights of the Defendant and highly favorable to the Plaintiff, the jury, after a long period of determination, returned a verdict in favor of this Defendant. The Court did not coerce the verdict as that term is generally used. The Court only read the "Allen Charge". This was a fit and proper thing for the Court to do. But when the jury brought back a verdict favorable to the Defendant, the Court was dissatisfied as shown in the following remarks made on January 16, 1962 at the hearing on Plaintiff's Motion for a New Trial:

> "Now, I thought when the jury was hung, that after so long a trial and so much involved, and the labor and expense of another trial, that the jury might be doing both parties a favor by trying to get together, and I virtually told them so. If I had thought at the moment that it was a question of liability, I would have refrained from it, but I thought it was a question of the amount."

The jury found differently from the Court's expectation in the matter, so the Court set the verdict aside and granted the Plaintiff a new trial. This action by the Court was an

abuse of discretion and deprived Defendant of a substantial right, indeed.

XIII.

The Court erred in granting the Motion to Dismiss and Motion for Summary Judgment filed by the Cross-Defendant, Neosho Valley Cooperative Creamery Association as to the Cross-Action filed herein by the Defendant, North Texas Producers Association, such action having been taken by the Court at the Pre-Trial Hearing held on April 8, 1963, as shown by the Pre-Trial Order signed and entered pursuant to such Hearing. On the identical allegations of conspiracy, the Court dismissed one of the co-conspirators (Neosho) and left the other co-conspirators (Metzger, et al) in the case. If the allegations were good as against one co-conspirator, they were good against the other co-conspirators. Such action by the Court had the effect of deleting from the case "Plaintiff's Motion for Production of Documents and Records" directed to the Cross-Defendant, Neosho Valley Cooperative Creamery Association as well as the "Original Interrogatories propounded by Plaintiff, North Texas Producers Association to the Defendant, Neosho Valley Cooperative Creamery Association", which said pleadings are adopted herein by reference as though fully set out verbatim. The information and evidence sought by such pleadings was vital and material to the presentation of Defendant's said Cross-Action and would have also been material as to Defendant's defensive position with respect to Plaintiff's main suit, such action by the Court defeated this Defendant's right to discovery, as provided by the Rules of Civil Procedure and deprived it of a substantial right and a fair trial.

XIV.

The Court erred in granting that portion of Plaintiff's Motion to Dismiss, to Strike and for Summary Judgment

seeking the deletion of the following portion of Paragraph II of Defendant's Cross-Action (Designated at the time as "Plaintiff's First Amended Original Complaint" and Civil Action No. 8989), as follows:

> ". . . and by importing large quantities of foreign milk, that is, milk produced outside of the North Texas milk shed and from distant sources so as to dilute the local pool and to cause the local dairy farmer to receive less money for his milk and to thereby destroy the effectiveness of Plaintiff (North Texas Producers Association) as a marketing association for the benefit of its members."

Such action was taken by the Court in the Pre-Trial Order entered pursuant to the Pre-Trial Hearing held April 8, 1963. This allegation was a material and vital portion of the conspiracy alleged by North Texas Producers Association and showed pointedly the manner in which Metzger Dairies, Inc. and the other alleged co-conspirators had agreed to carry out the terms and conditions of the alleged conspiracy. That which would otherwise be perfectly legal becomes quite illegal when done pursuant to an illegal conspiracy.

XV.

The Court erred in granting that portion of Plaintiff's Motion to Dismiss, to strike and for Summary Judgment as to the Cross-Action of North Texas Producers Association seeking to delete Paragraph IV of such Cross-Action, (denominated at that time "Plaintiff's First Amended Original Complaint" and Civil Action No. 8989) for the reason that all of the allegations contained in said Paragraph IV clearly and distinctly set forth the manner in which the Cross-Defendant, Metzger Dairies, Inc., and the other co-conspirators carried out their combination and conspiracy in violation of Sections 1 and 2 of the Sherman Anti-Trust Act by transporting raw milk from Kansas and

other areas to the Dallas market in quantities in excess of 5,000,000 pounds per month for the alleged purpose of damaging and injuring the Cross-Plaintiff, North Texas Producers Association. That such allegations were proper and material and Defendant, North Texas Producers Association, was entitled as a matter of substantial right to maintain the allegations and to offer proof in support thereof.

XVI.

The Court erred in granting the Motion of Metzger Dairies, Inc., et al to Dismiss, to Strike and for Summary Judgment as to the Cross-Action of North Texas Producers Association in ordering the deletion of Paragraph V, which alleged injury to the public in the Dallas marketing area by the actions of Metzger Dairies, Inc. and in importing Kansas milk since the local citizens were deprived of the right of having the milk consumed in Dallas to be controlled and inspected on the same basis and subject to the same rigid regulations applicable to locally produced milk. Such allegations demonstrate public injury and harm and should have been allowed to stand so that Defendant, North Texas Producers Association, could have offered proof in support thereof at the trial. This action by the Court, as outlined in its Pre-Trial Order, entered pursuant to the Pre-Trial Hearing held April 8, 1963, deprived Defendant, North Texas Producers Association, of a substantial right and prejudiced it to a fair trial of all of the issues involved herein.

XVII.

The Court erred in granting Plaintiff's Motion to Dismiss, to Strike and for Summary Judgment and requiring the deletion of the following allegation from Paragraph VI of the Cross-Action, as follows:

> "In addition to endangering the supply of pure and wholesome milk to the public."

This action was taken by the Court in its Pre-Trial Order entered pursuant to the Pre-Trial Hearing held April 8, 1963. This allegation should have been allowed to stand for the reason that it demonstrates another theory of public injury by reason of the actions of Metzger Dairies, Inc. concerning the alleged conspiracy. It may be that the allegation was to a certain extent conclusive and that the Defendant and Cross-Plaintiff, North Texas Producers Association, should have been required to state more details in this connection, but the allegation is clear and distinct enough that it should not have been ordered stricken. The Court's action in this connection has deprived Defendant, North Texas Producers Association, of a substantial right.

XVIII.

The Court erred in its ruling stated in the Pre-Trial Order entered pursuant to the Pre-Trial Hearing held April 8, 1963 as to Plaintiff's Motion to Suppress Evidence in that the Court ruled that no reference should be made during the second trial as to any proceedings in the State Court nor to any statute of the State of Texas. One of the primary matters of defense and cross-action alleged by North Texas Producers Association is that the Plaintiff, Metzger Dairies, Inc., made it a practice and carried on a continuing campaign to contact the individual members of the Defendant Association and to attempt to induce them to breach their marketing contracts by selling milk directly to the Plaintiff and to attempt to induce them to resign their membership from North Texas Producers Association. This is a practice that no other processor in the market follows. The practice of inducing a member to sell his milk directly to the Plaintiff breaches the Agricultural Marketing Statutes of the State of Texas and Defendant should have been allowed to make reference to this. There was a State Court proceeding in which Defendant was

granted an injunction against Metzger Dairies, Inc. stopping it from receiving the milk of member producer, A. C. Higgins, except through North Texas Producers Association. Defendant should have been allowed to introduce said Temporary Injunction, both as a matter of defense and as a matter of cross-action. In depriving Defendant of this right, the Court greatly prejudiced Defendant's position at the trial.

XIX.

The Court erred in overruling the Motion of Defendant North Texas Producers Association for a Summary Judgment both at the Pre-Trial Hearing of April 8, 1963, as shown by the Pre-Trial Order entered pursuant to such hearing, and by again overruling said motion at the conclusion of the second trial, as shown by the record and transcript herein, for the reason that under all of the pleadings, depositions, admissions, interrogatories, transcript of the testimony submitted at the first trial on the merits and the record of evidence submitted at the second trial on the merits, the Defendant was entitled to a Judgment as a matter of law. There was no monopoly because the minimum price of milk is controlled by the Federal Milk Marketing Order No. 43 effective in the North Texas Market and because it would be impossible for Defendant to exclude competitive milk from the market. There is no causal connection between the alleged violations and the alleged damages. Monopoly power relates to competition and Plaintiff and Defendant are simply not competitors. Quote simply, Plaintiff could have continued to purchase all the milk that it needed from the Defendant and not sustained *any damage*. When Plaintiff waived the alleged Clayton violations during and at the conclusion of the second trial, it became all the more proper for the Court to grant Defendant's Motion for Summary Judgment and the

Court's refusal to do so deprived Defendant of a substantial right.

XX.

The Court erred in overruling Defendant's Motion to Supress the Deposition of the Witness Tom A. Ellis. This was the deposition of a newspaper reporter at Springfield, Missouri taken in an attempt to qualify for evidence a newspaper article purporting to report a speech made in Springfield, Missouri by Attorney Harold Nelson (one of Defendant's attorneys of record herein). Pursuant to the Court's ruling, counsel for Plaintiff was allowed to read the following portion of said newspaper article:

> "Texas producers are pretty well organized. When we ask for a raise on a realistic basis, we generally get it. But we can't gain our point if we are to permit the chiseler to use his little dab of milk to break our market.
>
> And the producers who allow your milk to be used in that way are nothing less than scabs. The chiselers deliver milk in Springfield, and it is brought from 500 to 1,000 miles away, just to beat down our prices and break our market."

Said article was pure hearsay by any definition. The article nowhere named any party to this lawsuit. There was no showing that Plaintiff was even purchasing milk in the area of the meeting at which the speech was made referred to in the article. Said newspaper article was purely inflammatory and prejudicial and calculated only to inflame the passion of the jury adversely to the Defendant. There was no showing that the remarks even related to the dispute involved in this lawsuit or that Nelson had any authority to make said remarks on behalf of Defendant herein, or that Defendant herein or any of its agents or employees was even aware that Nelson was in Springfield, Missouri to make a speech or for any other purpose. Allowing the

quoted portion of the article to be read to the jury hopelessly prejudiced the Defendant herein and deprived it of substantial rights at the trial.

XXI.

The Court erred in overruling Defendant's objections to the reading of the deposition of the witness Tom A. Ellis and the reading of the portion of the newspaper article in controversy quoted in the foregoing paragraph for the reason that said deposition and said newspaper article were obviously inadmissible as being pure hearsay, purely inflammatory and not binding on the Defendant for any purpose.

XXII.

The Court erred in stating in the presence of the jury that as to the newspaper article referred to in the foregoing two paragraphs, it would have preferred to delete the words "scab" and "chiseler" but that it could not do so since it would destroy the effect of the article "as in some criminal evidence". The Court further stated:

> "As, for instance, bloody clothing, in a murder case. You can remember the speech of Mark Anthony at Caesar's funeral, 'I came not to bury Caesar' and further, 'They say he was ambitious,' but look at this will and see what he has done.
>
> Ambitions should be of sterner stuff. He said, 'Here is the cloak that he wore.' and, 'where the blood rushed out,' and to say that he was unkindly of anyone, that is in line with the bloody shirt to prove the death of a man."
>
> "Where a man is dead, the bloody shirt doesn't prove anything, except to arouse prejudice."

All of this reference by the Court in the presence of the jury to criminal evidence, blood, bloody cloak, bloody shirt

and death in reference to the newspaper article was hopelessly prejudicial to the Defendant's rights.

XXIII.

The Court erred in admitting in evidence Plaintiff's Exhibit No. 7. The letter from J. O. Woodman, Manager of Defendant Association, to Jacob Metzger, dated September 29, 1958, over the timely objection of the Defendant for the reason that said letter was plainly an offer to compromise a dispute that had existed between the parties commencing September 1, 1958. The Exhibit, although plainly objectionable for the reason stated, could relate only to the alleged violations of Section 2e and 3 of the Clayton Act, which Plaintiff plainly abandoned during the trial, so that the only purpose said Exhibit served was to prejudice the position of the Defendant in the eyes of the jury.

XXIV.

The Court erred in making the following remark during Defendant's cross-examination of the witness Jacob Metzger, to-wit:

> "The issue is: Was there a conspiracy and did it hurt this man and how?"

for the reason that such remarks is erroneous and highly misleading and could only have the effect of leading the jury to speculate on matters which were not issues in the case, thereby leading to speculation highly prejudicial to the Defendant's rights herein. There was no issue of whether there was a conspiracy against the Plaintiff. Such statement by the Court would leave the jury open to speculate that if two or more members or employees of the Defendant Association conspired together that the Association would be guilty of a violation of the Anti-Trust Laws, which is simply not the law.

XXV.

The Court erred in allowing the Witness, Floyd W. Stevens to testify over the timely objection of Defendant to the effect that the North Texas Producers Association conducted a meeting in Wise County in September 1958 for the reason that the witness could not possibly be qualified to testify that the Defendant called said meeting and, in fact, there was never any evidence that the Defendant actually called said meeting, participated in it to any extent or ever ratified the meeting or any action taken by the Wise County dairy farmers pursuant thereto.

XXVI.

The Court erred in allowing the Witness Floyd W. Stevens to testify over the timely objection of the Defendant that some of his retail customers (grocers) refused to buy Metzger's milk since this was absolute hearsay as to the Defendant. The only proper way to have proved this purported fact would have been to produce a grocer and have him testify directly on the matter. The Plaintiff never produced any such grocer at any time during the trial and the Defendant was greatly prejudiced when the Court allowed the Plaintiff to use plain hearsay evidence in the presentation of its case.

XXVII.

The Court erred in allowing the Witness Ernest Lee to testify over the timely objection by the Defendant to the effect that various retail grocers in Hopkins County instructed the witness not to bring Metzger's milk to their stores any more for the reason that such testimony was plainly hearsay and was really no evidence at all and by allowing the Plaintiff to constantly repeat such hearsay testimony, the Court allowed Plaintiff to establish a ma-

terial fact in a highly prejudicial manner and without any evidence. Defendant was certainly entitled to have Plaintiff prove such fact by direct evidence. Plaintiff never at any time during the trial offered the testimony of one single retail grocer to the effect that he had quit purchasing Metzger's milk or why he had done so.

XXVIII.

The Court erred in allowing the Witness K. L. Waters to testify over the timely objection of the Defendant to the effect that after Foremost Dairies resumed the purchase of milk from the Defendant Association in September 1958 the Defendant did not impose the condition on Foremost that Foremost get permission from Defendant before buying milk from any other source for the reason that such testimony could only have been an attempt to prove a violation of Section 2e or Section 3 of the Clayton Act, which Plaintiff clearly abandoned during the trial. By allowing such testimony and the constant repetition by Plaintiff's counsel of matters relating to alleged discrimination, the Court greatly prejudiced Defendant's position by allowing the jury to speculate to the effect that every thing Defendant did during the period in controversy was illegal and a violation of the Anti-Trust Laws, which is simply not true.

XXIX.

The Court erred in making the following statements to counsel and to the jury, to-wit:

> "The Court's impression is that one of the elements of the controversy of this kind is to show discrimination, if it existed."
>
> "I think that discrimination between buyers or between sellers has been held a violation of the law. You take, for instance, the strawberry case up from Louisiana, they would buy on cetrain days and then

without notice they would let the market get flooded and then they woud buy them under price, etc. because the market was flooded, and that was done as an undersatnding and that evidence was admitted in the Court. I believe we will admit it."

Such remarks were erroneous, highly prejudicial and inflammatory to Defendant's position at the trial and the only effect of such remarks was to lead the jury to believe that everything the Defendant did was illegal and a violation of the Anti-Trust Laws. Once again, discrimination could relate only to alleged violations of Sections 2e and 3 of the Clayton Act, which Plaintiff clearly abandoned.

XXX.

The Court erred in admitting in evidence over Defendant's timely objection Plaintiff's Exhibit No. 12 purporting to be a schedule of the excess cost of milk to the Plaintiff from September 17 ,1958 through October 31, 1960 by reason of having purchased milk from outside the State of Texas rather than from the Defendant for the reason that said Exhibit is based upon mere conjecture, speculation and guesswork. It is speculative as to the *fact* of damage. There was never any showing that the Defendant refused to sell the Plaintiff milk and, in fact, the uncontroverted evidence is that the Defendant never did refuse to sell Plaintiff milk. Since Plaintiff could have always purchased milk from the Defendant at the cheaper price shown on said Exhibit 12, it is sheer speculation to say that Plaintiff sustained any *damages* as a result of anything done by the Defendant. The point is that if Plaintiff wanted to sue for damages sustained by Defendant's alleged monopoly, the only way that Plaintiff could have possibly sustained damage would have been to go ahead and deal with the "monopolist" and then sue it for the excess that it was charging for its product over and above the actual value

thereof. There is no evidence that Defendant's product was ever priced above its actual value. There is obviously no causal connection between the alleged monopoly and the alleged losses set forth in said Exhibit 12. Said Exhibit sets forth an improper measure of damages and as to amount it is based on nothing more than guesswork and speculation.

XXXI.

The Court erred in admitting in evidence over Defendant's timely objection Plaintiff's Exhibit No. 13 purporting to be a schedule of sales lost in Wise County from September 1958 through December 1, 1961 with the alleged "profit loss" as to such lost sales for the reason that said Exhibit is based upon mere conjecture, speculation and guesswork, both as to the fact of damage and also as to the amount of damages. Said Exhibit covers an improper period of time and is based upon an improper measure of damages. Said Exhibit is based upon "gross" profits rather than "net" profits.

XXXII.

The Court erred in admitting in evidence over Defendant's timely objection Plaintiff's Exhibit No. 14 purporting to be a schedule of projected sales losses by the Plaintiff in Wise County for the period December 1, 1961 to June 15, 1963 for the reason that said Exhibit is based upon mere conjecture, speculation and guesswork, both as to the fact of damage and as to the amount of alleged damage. Said Exhibit is based upon an improper measure of damages and upon an improper period of damage. Said Exhibit is based upon "gross" profits rather than "net" profits.

XXXIII.

The Court erred in admitting in evidence over Defendant's timely objection Plaintiff's Exhibit No. 15 pur-

porting to be a schedule of losses by Plaintiff as to Hopkins County for the reason that said Exhibit is based upon sheer conjecture, speculation and guesswork, both as to the fact of damage and as to the amount of damage. Said Exhibit obviously is based upon "gross" profits rather than "net" profit.

XXXIV.

The Court erred in admitting into evidence over Defendant's timely objection Plaintiff's Exhibit No. 16 purporting to be a projection of the sales losses in Hopkins County for the period from December 1, 1961 to June 15, 1963 for the same reasons stated in the foregoing paragraph.

XXXV.

The Court erred in admitting into evidence over Defendant's timely objection Plaintiff's Exhibit No. 17 purporting to be a schedule of increased production acquisition cost from September 1958 to December 1, 1961 showing telephone cost, additional field expenses, etc. for the reasons stated in the foregoing paragraph. Further, said Schedule relates to an improper period of damage. It is a different period of damage than set forth in Plaintiff's Exhibit No. 12 relating to the excess cost to purchase milk from out of state sources. Plaintiff's own testimony is to the effect that no damages are claimed as to the excess cost of purchasing milk outside the State of Texas after November 1, 1960, whereas Exhibit No. 17 extends the alleged damage period an additional year to December 1, 1961. It is impossible to understand why the Defendant, who at all times material hereto was trying to sell milk to the Plaintiff, could be liable to the Plaintiff for long distance phone calls and field expense incurred by Plaintiff in purchasing milk outside the State of Texas.

XXXVI.

The Court erred in admitting into evidence over Defendant's timely objection Plaintiff's Exhibit No. 18 purporting to be a schedule as to hauling expense incurred by Plaintiff for the period of January 1959 to April 1963 for the reason that said Exhibit is based upon mere conjecture, speculation and guesswork, both as to the fact of damage and as to the amount of alleged damage. Said Exhibit is based upon an improper measure of damage and upon an improper period of damage. Defendant never refused to sell Plaintiff milk and the undisputed evidence is that Defendant never refused to sell milk to the Plaintiff. It is difficult to comprehend why the Defendant should be required to pay Plaintiff its loss on hauling operations in connection with the delivery of milk to Plaintiff's plant by Defendant's competitors.

XXXVII.

The Court erred in admitting into evidence over Defendant's timely objection Plaintiff's Exhibit No. 19, which purports to be a summary of the previous exhibits for the same reasons stated in the foregoing seven paragraphs relating to the other Plaintiff's exhibits complained of. Also, for the reason that said Exhibit is cumulative and repetitious. Also, said summary uses the same figures as the previous exhibits but uses different periods of time.

XXXVIII.

The Court erred in restricting the testimony of the Defendant's witness, Troy Kern, in reply to the question propounded by Defendant's counsel "And then what did Mr. Metzger say to you?" When such question was propounded to said witness, Plaintiff's attorney interrupted and objected before the witness was even allowed to give his an-

swer on the grounds that at the previous trial of this case, the Court had later given an instruction to the jury not to consider certain portions of said answer. Upon Plaintiff's attorney's request, a hearing was held outside the presence of the jury on the question of the witness Kern's answer to the question. After considerable discussion, the Court instrutced the Witness Kern to read his answer to the question given at the former trial, but ordered certain portions of said answer to be deleted and not read to the jury. The Defendant timely objected to this entire procedure and duly presumed this objection throughout of the hearing. Such ruling by the Court deprived Defendant of a substantial right, the right to have a material witness (actually a principal witness, Mr. Kern being at the time in question the President of the Defendant Association) testify verbally from his own memory as to the substance of his conversation with Jacob Metzger in February of 1959. The portion of the witness Kern's testimony ordered to be deleted by the Court was material on the issue of just which of these parties was refusing to deal with the other. In any event, in editing the witness' answer and forcing him to read only a portion thereof out of context with the full answer, the Court deprived the Defendant of a substantial right. The testimony of the witness Kern given at the first trial and at the second trial on this point as well as the Court's remarks in chambers in regard thereto are adopted by reference as though fully set out herein verbatim.

XXXIX.

The Court erred in overruling Defendant's Motion to Allow The Testimony of Troy Kern for the reasons and grounds stated in said Motion, which is adopted herein by reference as though fully set out verbatim. Overruling such Motion was also error for each of the reasons stated in the foregoing paragraph.

XXXX.

The Court erred in overruling Defendant's First Motion For An Instructed Verdict presented to the Court when the Plaintiff rested its case and before the Defendant offered any testimony. For the purpose of this Motion for the New Trial, Defendant adopts said First Motion for an Instructed Verdict by reference as the same appears in the transcript of the second trial of this cause as though fully set out verbatim.

XXXXI.

The Court erred in overruling Defendant's Second Motion For An Instructed Verdict for the reasons and facts stated in said Motion, which is adopted herein by reference as though fully set out verbatim.

XXXXII.

The Court erred in submitting the case to the jury on a general charge which, in effect, deprived Defendant of a full trial by jury as to the ultimate, disputed fact issues. Defendant timely objected to the Court's charge on this ground. The record is voluminous, the testimony was extensive and the pleadings numerous and complex and the Defendant was certainly entitled to have each alleged violation of the Anti-Trust Laws passed upon by the jury. There were numerous issues to the case to be determined. Whether Defendant monopolized the marketing of raw milk in the Dallas-Ft. Worth area by the use of unlawful means and predatory trade practices (the Court nowhere defined "unlawful means" or "predatory trade practices", but left these matters open to speculation by the jury); whether the Defendant attempted to monopolize by the use of the same means; whether there was any public injury; whether there was any substantial restraint of in-

terstate commerce; whether there was any causal connection between the alleged violations and the alleged damages; whether any boycotts, as defined by law, occurred in Wise and Hopkins Counties; whether such boycotts, if any, were sponsored, authorized or ratified by North Texas Producers Association; what damages, if any, would be allocable to the boycotts, if any; whether the defendant discriminated against the Plaintiff in the particulars alleged; discrimination, if any, caused Plaintiff any damage; the amount of damages, if any, allocable to such discrimination, if any. The Court erred in overruling all of the objections to the Court's charge and supplemental charge as made by the Defendant at the proper time, as such objections appear in the record herein. For the purpose of this Motion, Defendant adopts by reference all of its objections and exceptions to the Court's charge as they appear in the record of the second trial of this case as though fully set out herein verbatim.

XXXXIII.

The Court erred in submitting this case to the jury on a general charge since due to the complex and complicated nature of the facts and the law herein, such submission was highly prejudicial to Defendant's rights in leaving all matters as to what was legal and what was illegal open to speculation and conjecture by the jury.

XXXXIV.

The Court erred in failing and refusing to submit the Defendant's requested special issues contained in the written pleading filed herein designated "Defendant and Cross-Plaintiff's Requested Issues" (adopted by reference as though fully set out herein) since the Defendant would be entitled to a finding in answer to its requested special issues numbered one, two, three, four and five.

XXXXV.

The Court erred in failing and refusing to submit the Defendant's requested special instructions as contained in the written pleadings filed herein and designated "Defendant and Cross-Plaintiff's Requested Special Instructions" (adopted by reference as though fully set out herein). The charge of the Court as given fails to properly charge the jury with respect to the exemptions and immunities afforded the Defendant by the terms and provisions of Section 6 of the Clayton Act and the Capper-Volstead Act.

XXXXVI.

AGAINST WEIGHT AND PREPONDERANCE OF EVIDENCE

The finding of the jury on the issue of damages is so against the great weight and preponderance of the evidence, is based upon such confusion in Plaintiff's testimony, and exhibits and such confusion in the Court's charge and instructions as to indicate prejudice on the part of the jury and said verdict should be set aside and a new trial granted. In the alternative, said verdict is not supported by the evidence. The undisputed testimony is that starting in August 1960 the Kansas milk producers (members of Neosho Valley Creamery Cooperative Association) were placed under Federal Order No. 43, the Federal Milk Marketing Order governing the North Texas Market, and that beginning then the Plaintiff did purchase milk from the Kansas producers at the same price that it could purchase milk from local North Texas milk producers. The testimony of expert witness Joe Murphey is undisputed to the effect that the Kansas producers could have been placed under Federal Order No. 43 as early as October 1, 1958. If Plaintiff had taken this action as early as October 1, 1958, it would have suffered no damage whatever, or at least just a nom-

inal sum for the last couple of days of September. The further undisputed testimony of said witness Murphey was to the effect that there were ample supplies of Class II (or surplus) milk available in various surrounding markets, a sufficient quantity of which could have been placed on the Dallas market as early as October 1, 1958 at no additional cost to Plaintiff in the same manner that Plaintiff eventually placed the Erie, Kansas producers on the Dallas market under the terms and provisions of Federal Order No. 43.

CONFUSION IN PLAINTIFF'S OWN TESTIMONY

Mertzger's own testimony was that his damages for excess cost to purchase foreign milk was shut off in August of 1960 for the reason that beginning at that time he had placed the Erie, Kansas producers under Federal Order No. 43 so that he was then able to purchase their milk at the same price that he could purchase milk from local producers. Actually there was such a basic and glaring conflict in Plaintiff's own testimony as to its period of damage as to excess cost that the jury could not possibly have made any accurate computation or estimate of damages and for the jury to have even attempted to do so further pointed up the passion and prejudice that they held against the Defendant herein. The testimony of Plaintiff's witness Frances Clem was to the effect that the damages for excess cost to purchase foreign milk terminated October 31, 1960, when Metzger resumed purchasing supplemental loads of milk from Defendant Association pursuant to the offer of W. T. Crouch (President of Association) made on July 14, 1960.

CONFUSION IN PLAINTIFF'S OWN EXHIBITS AS TO DAMAGE

Plaintiff's Exhibit No. 17 shows increased cost attributable to finding a supply source including telephone

expense, field and out of state travel expense for the period September 1958 through December 1961 and prorated automobile expense for the period September 1, 1958 through November 30, 1961 in the total amount of $10,170.49.

Plaintiff's Exhibit No. 19, a summation of all Plaintiff's exhibits showing total damages of $606,857.57, shows the damage for $10,170.49 as being for the period September 1958 through April, 1963.

Plaintiff's Exhibit No. 18 shows a schedule of hauling expense and income and total loss to Metzger Dairies during the period January 1959 through April 1963 in the amount of $96,289.31.

Plaintiff's Exhibit No. 11 shows damages for excess cost of foreign milk terminated October 31, 1960 when Metzger resumed purchase of supplement milk from the Association. Yet, Plaintiff's Exhibits No. 17, 18 and 19 based damages on periods of time on increased cost attributable to obtaining milk supplies differently and in excess of that relied upon in Plaintiff's Exhibit No. 11 which terminated October 31, 1960.

Although Plaintiff's Exhibits No. 11, 17 and 18 all relate to excess cost in acquiring milk supply they each use a different period of damage. To further confuse the matter, Plaintiff's Exhibit No. 19 in attempting to recapitulate the previous exhibits as to damages uses *still different* damage periods but conveniently retains the same figures as to alleged losses.

CONFUSION IN COURTS CHARGE AND INSTRUCTIONS

The Court's original charge instructed the jury to find damages to the date the trial began, June 17, 1963 and

stated that Plaintiff sued for damages in the sum of $507,-133.33 and further instructed the jury that they could not find in excess of that sum. After the jury had deliberated for 25 minutes the Court called the jury back into the courtroom and gave them further instructions on the question of damages. The Court at that time instructed the jury that they should compute damages down to the date November 1, 1960 and the jury was retired for further deliberation. Counsel for Plaintiff objected to the Court's charge and supplemental instruction on the ground that in limiting the damage period to November 1, 1960, the Court was depriving the Plaintiff of approximately $100,-000.00 of its claim as to boycott damages which counsel stated should continue down to the date trial began. Later the jury sent the Court a note stating "Date of filing amended complaint. (signed Perry Masterson)". The following morning the Court called the jury back into the courtroom. In open court the jury foreman advised the Court that jury did not understand the date referred to in the supplemental charge read the previous day. Whereupon the Court then read a supplemental instruction to the jury. The supplemental instructions defined the period of damages as to excess cost to purchase milk as being "from the date in September 1958 when the Plaintiff no longer received milk from the Defendant" to November 20, 1960. Said Instruction then defined the period of damage for the alleged boycott to be down to the "present time" (which was then June 27, 1963). After the jury was retired for further deliberation, the counsel for Plaintiff objected to the supplemental charge for the reason that the Court had still left the figure $507,133.33 in the original charge without making a correction. Plaintiff's counsel stated that the figure should be changed to $606,857.57.

CONCLUSION

Since the jury's verdict on the question of damages went against the great weight of the evidence and, in fact, against the undisputed evidence, since said verdict was based upon hopeless confusion in the Plaintiff's own evidence on the question of damages both as to amount and, particularly, as to periods of damage and since the Court's charge was also based upon the same confusion and was further confused by the Court's attempts to further explain questions of damage to the jury which only resulted in more confusion and more errors as to the period of damage, it is manifest that the Defendant did not and indeed could not receive a fair trial in this connection. By reason of these circumstances, the jury simply could not have computed damages in a fair and impartial manner.

XXXXVII.

The Court erred in submitting the supplemental charge to the jury on June 27, 1963 after the jury had been in deliberation and erred in making its remarks to the jury in connection with such supplemental charge for the reason that such supplemental charge was not responsive to the jury's note and by constantly repeating the question of damages and the periods to be taken into consideration amounted clearly to a coercion of the verdict against the Defendant. The Court even desired to bring the charge back after reading the supplemental charge and to correct the damage figure alleged by Plaintiff upward to the sum of $606,857.57 with a pen. Defendant objected to this procedure as amounting to a coercion of the verdict by constant repetition of the question of damages. The Court said:

> "I don't think it is a coercion. I think it may lend a little emphasis."

After the Defendant stated its objections and exceptions to said supplemental charge and to the request to make an additional change by pen, the Court said:

> "I believe, however, I will not change these figures because if I do change it, I could call the Jury's attention to it, and the supplemental charge relates to figures, and I am inclined to feel it might impress them that the Court has in mind that they are directed to return a verdict in favor of the Plaintiff."

In any event, the Court had already coerced the verdict at this point. For the purpose of this Motion all statements by the Court and by counsel as contained in the transcript of the second trial are adopted herein by reference as though fully set out verbatim.

XXXXVIII.

The Court erred in sustaining Plaintiff's objection to Defendants' Exhibit No. 6 and excluding such Exhibit from the evidence. Said Exhibit was a copy of Federal Milk Marketing Order No. 43, as amended effective September 1, 1957, issued by the United States Department of Agriculture and being the Federal Order regulating the handling of milk in the North Texas Marketing area. Said Federal Order had been testified to and described throughout the trial by various witnesses for both sides, especially with reference to the question of minimum prices applicable to milk priced under such Order and with respect to the question of the base-excess plan relating to when out of state milk could be obtained on this market at the same price paid to Defendant Association. Said Federal Order No. 43 was the best evidence as to what the various provisions in controversy actually were. The Court had admitted the Exhibit at the first trial, but excluded it at the second trial. The Exhibit is not a statute by any definition or

construction but is a regulation promulgated following a hearing had in the marketing area pursuant to the Agricultural Marketing Agreement Act of 1937 as amended.

XXXXIX.

The verdict of the jury against the Defendant was against the great weight and preponderance of the evidence and was, in fact, against the undisputed and uncontroverted evidence in that the Association was not and could not possibly create a monopoly in the marketing of raw milk in the Dallas-Fort Worth area.

The undisputed evidence introduced by both parties shows that there is extensive and keen competition in the sale of raw milk in the Dallas market. The record shows the following milk to be in competition on this market:

(1) Milk marketed by Defendant.

(2) Large volumes of milk brought on this market from Springfield, Missouri by Foremost Dairies.

(3) Milk marketed by Lamar Creamery Cooperative of Paris, Texas.

(4) Milk marketed by Independent Dairyman's Association.

(5) Milk marketed by dairy farmers who are not members of any cooperative marketing association.

(6) Vast volumes of surplus milk in nearby alternative markets which was and is readily available to the market to supply the requirements of milk companies in the Dallas-Fort Worth market as producer's milk under Federal Order No. 43 at the same cost as milk obtained from local producers, this being fully and completely demonstrated by the fact that the Plaintiff obtained Kansas milk in August 1960 at no ad-

ditional cost by placing the milk of said Kansas farmers under Federal Order No. 43 at no additional cost.

The undisputed testimony in the record is that because of the availability of surplus milk from other nearby markets the Defendant could not price its product in excess of the economic value thereof, said economic value being limited primarily because of the vast quantities of surplus milk available from nearby alternative markets.

The undisputed testimony of the expert witness Joe Murphey is that the economic pressure of such vast surpluses of milk on the farmer in other markets moves his milk to this market to obtain blend price for his milk rather than surplus price thereby increasing the return to such farmer in the other market.

The testimony of both parties shows that the Defendant could not control the supply of milk because when the Defendant priced its milk at $5.82 the Plaintiff says that it had to pay in excess of this amount to obtain its supply elsewhere which shows conclusively that the Defendant price in September 1958 was not unduly high nor in excess of its true economic value.

Further undisputed testimony of the witness Murphey is that Federal Order number 43 does not dictate to any milk company as to the quantity that any such company must purchase, nor does it dictate to said milk company the source from which milk must be obtained. The supply can be purchased from any source (which Metzger did).

The ready availability of tremendous surpluses of milk from adjoining markets at Federal Order No. 43 minimum price absolutely forecloses any possibility of monopoly.

L.

The verdict of the jury against the Defendant is contrary to the great weight and preponderance of the evidence and, in fact, is contrary to the undisputed evidence in that based upon the instruction of the Court as to the definition of boycott and secondary boycott there is no evidence in the record of probative value which would show that the Defendant ever authorized, participated in, encouraged or ratified any boycott in Wise County or Hopkins County or anywhere else.

LI.

The Court erred in granting Plaintiff's Motion to Dismiss and for an Instructed Verdict as against Defendant's Cross-Action when the Defendant rested its case at the second trial. The pleadings and the proof offered by the Defendant were sufficient to raise all of the issues claimed and Defendant should have at least been entitled to have the matter passed upon by the jury.

LII.

The Court erred in granting a new trial on January 16, 1962 and thereby setting aside the verdict rendered in favor of the Defendant at the first trial of this cause, since the Court granted said new trial on its own motion and without any authority since the verdict was amply supported by the record and since the only instruction read to the jury after advising the Court that it was deadlocked was the so-called "Allen Charge" which was perfectly proper. Although the written order granting said new trial purports to state that the Court granted Plaintiff's Motion for the reason that the verdict was against the great weight of the evidence and for the reason that the Court's remarks had coerced the jury such was not the case at all

as the transcript of the Court's reading of the Allen Charge will reflect and the transcript of the remarks made by the Court on January 16, 1962 will reflect. The Court's action in granting said new trial was an abuse of discretion.

WHEREFORE, PREMISES CONSIDERED, Defendant prays for a Judgment Notwithstanding the Verdict and only in the alternative that the Court should refuse such motion for a Judgment Notwithstanding the Verdict, the Defendant then prays the Court to enter on Order granting a new trial herein and for such other orders as to the Court may seem proper.

Respectfully submitted,

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ED GOSSETT

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CERTIFICATE

The undersigned hereby certifies that copies of the above and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have this day been served upon counsel for defendant by depositing same in the United States mail, with sufficient postage affixed, addressed as follows:

Messrs. Charles P. Storey, Paul S. Adams, Jr. and John K. DeLay, Jr.

Storey, Armstrong & Steger
Attorneys at Law
2700 Republic National Bank Building
Dallas, Texas

New Orleans, Louisiana, this ..... day of October, 1965.

Ashton Phelps

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In the

Supreme Court of the United States

OCTOBER TERM, 1965

No. 671

NORTH TEXAS PRODUCERS ASSOCIATION,
Petitioner,

v.

METZGER DAIRIES, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OCTOBER TERM, 1965

No. 671

NORTH TEXAS PRODUCERS ASSOCIATION,
Petitioner,

v.

METZGER DAIRIES, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT

This is an antitrust suit under Section 2 of the Sherman Act, 15 U.S.C. § 2, in which the basic principles of law involved were settled by the decision of this Court in *Maryland & Virginia Milk Producers Association v. United States*, 362 U.S. 458, 80 S. Ct. 847, 4 L. Ed. 2d 880 (1960). The Court of Appeals below affirmed the judgment for Respondent entered on the jury's verdict in the second trial of this case, which found that Petitioner had monopolized or attempted to monopolize the marketing of raw milk in the North Texas area (engaging in boycotts and other predatory trade prac-

tices against Respondent), from which actions Respondent suffered actual damages to the extent of $365,000.00.

Petitioner, having conceded for the purposes of its Petition for Writ of Certiorari that the jury's verdict in the second trial was supported by the evidence, raises no points peculiar to an antitrust case. Instead, Petitioner limits its attack on the Court of Appeals' decision solely to the affirmance of the trial court's granting of a new trial following the first trial, requesting this Court to grant certiorari and to hold that the Court of Appeals erred in failing to find that the trial court abused its discretion in granting a new trial.

Respondent's Motion for New Trial stated as grounds therefor:

"I.

"Because the verdict of the jury is so clearly against the overwhelming weight of the evidence * * *

"II.

"The verdict of the jury in favor of Defendant Association is unconscionable and so clearly against the overwhelming weight of the evidence that same should be disregarded * * *" (R. 1236)

The Order Granting New Trial recites:

"ORDERED, (3) that the motion of Plaintiff for new trial be granted on the grounds that, considering the evidence as a whole and weighing it, the Court is of the opinion that the verdict of the Jury is wrong and is contrary to the weight of the evidence, and for the further reason that the Court is of the opinion that error was committed in statements made by the Court to the members of the Jury after the Jury had indicated in writing that they were unable to reach a verdict, which statements by the Court had the effect of coercing the verdict." (emphasis added) (R. 1261)

The Statement in the Petition for Writ of Certiorari is argumentative and is not an accurate statement of the nature and result of the case. However, in the interest of brevity, no specific reference to the many inaccuracies will be made. For the purpose of this reply brief, Respondent adopts the statement of the nature and result of the case set forth in the opinion of the Court of Appeals.

RESPONSE TO PETITIONER'S "QUESTIONS PRESENTED"

1. The Seventh Amendment of the United States Constitution is not violated by a United States District Court's entry of an Order Granting a New Trial after a jury verdict which is "wrong and contrary to the weight of the evidence." (R. 1261)

2. The Order Granting a New Trial recites valid reasons therefor, including, "* * * the verdict of the jury is wrong and contrary to the weight of the evidence * * *." (R. 1261)

3. Where the Motion for New Trial alleged that the verdict was against the weight of the evidence and the court's Order granted a new trial explicitly on such basis, no error was committed by the trial court's stating additional grounds for granting the new trial.

4. Respondent's filing of an affidavit in the trial court is no reason for review of this case by the Supreme Court, particularly when there is nothing in the record to indicate that the trial court either "accepted" or relied upon such affidavit.

5. There was no error by the trial court in ordering a new trial because "the verdict is wrong and contrary to the weight of the evidence * * *" where the Motion for New Trial assigned such ground as error.

6. Where the Motion for New Trial alleged that the verdict was against the weight of the evidence and the court's Order granted a new trial explicitly on such basis, no error was committed by the trial court's mentioning other considerations for granting a new trial.

7. Where the Motion for New Trial alleged that the verdict was against the weight of the evidence and the court's Order granted a new trial on such basis, no error was committed by the trial court's recitation of other factors it considered relevant in deciding to grant a new trial.

ARGUMENT

Order Granting New Trial Does Not Violate Right of Trial by Jury

Petitioner here seeks to have this Court declare that the Seventh Amendment of the United States Constitution is violated if a federal district court orders a new trial when "the verdict of the jury is wrong and contrary to the weight of the evidence." The decisions of the Supreme Court and of the Courts of Appeals have repeatedly held just the opposite—i.e., that the common law power to grant or deny a motion for new trial is an important function of the trial judge in conducting a jury trial. As stated by Justice Gray

in *Capital Traction Co. v. Hof*, 174 U.S. 1, 13, 19 S. Ct. 580, 43 L. Ed. 873, 877 (1898):

> " 'Trial by jury,' in the primary and usual sense of the term at the common law and in the American Constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of *a judge empowered* to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) *to set aside their verdict if in his opinion it is against the law or the evidence.* This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion. Yet there are unequivocal statements of it to be found in the books." (emphasis added)[1]

It has also been clearly recognized that such power to grant a new trial is not in derogation of the Seventh Amendment's guarantee of trial by jury. For example, as pointed out by Judge Taft in the often cited case of *Felton v. Spiro*, 6 Cir., 1897, 78 F. 576, 583:

> "There is a suggestion, in the opinion of the judge at the circuit on the motion for new trial, that to set aside a verdict as against the weight of the evidence is in violation of the seventh amendment to the constitution, providing that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law. An examination of Judge Lurton's opinion in the Lowery Case will

[1] Similar statements are made in numerous Court of Appeals decisions. For example, see: *Maryland Casualty Co. v. Reid*, 5 Cir., 1935, 76 F. 2d 30; *Aetna Casualty & Surety Co. v. Yeatts*, 4 Cir., 1941, 122 F. 2d 350; *Felton v. Spiro*, 6 Cir., 1897, 78 F. 576.

> show that it was the habit of the judges of England, whence came the common law, to set aside verdicts as against the weight of evidence as early as Lord Mansfield's time and earlier. This would seem to show that the re-examination of the evidence necessary to set aside a verdict on such a ground was according to the rules of the common law."[2]

The extent of the power of the federal courts to grant new trials within the scope of our constitutional safeguards is clearly set forth in Judge Parker's definitive opinion in *Aetna Casualty & Surety Co. v. Yeatts*, 4 Cir., 1941, 122 F. 2d 350, 352, as follows:

> "The motion to set aside the verdict and grant a new trial was a matter of federal procedure, governed by Rule of Civil Procedure 59 and not subject in any way to the rules of state practice. On such a motion it is the duty of the judge to set aside the verdict and grant a new trial, if he is of opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. *The exercise of this power is not in derogation of the right of trial by jury but is one of the historic safeguards of that right.*" (emphasis added)

Appellate Review of Granting of New Trial Is Very Limited Because of Trial Judge's Broad Discretion

Petitioner complains that the Court of Appeals followed the uniformly accepted rule that the scope of appellate review of a trial judge's granting or denying a motion for new trial is very limited because of the broad discretion vested

[2] See also *Parsons v. Bedford, Breedlove & Robeson*, 3 Pet. 433, 7 L. Ed. 732 (1830); *Marsh v. Illinois Central R. Co.*, 5 Cir., 1949, 175 F. 2d 498.

in a district judge. Such complaint provides no reason for granting the Petition, for the Court of Appeals' recognition of this long established principle is not in conflict but rather is consistent with the pronouncements of the Supreme Court[3] and of the other Circuit Courts.[4]

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[3] In *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 53 S. Ct. 252, 77 L. Ed. 439 (1932), this Court reversed the judgment of the Circuit Court of Appeals which had reversed a trial court's denial of a motion for new trial. In the Court's opinion, at page 481, Justice Brandeis states:

> "The rule that this Court will not review the action of a federal trial judge in granting or denying a motion for new trial for errors of fact has been settled by a long and unbroken line of decisions * * * (citing 14 Supreme Court decisions) * * * The rule precludes likewise a review of such action by a circuit court of appeals. * * * More frequently the reason given for the denial of review is that the granting or refusing of a motion for new trial is a matter within the discretion of the trial judge." (citing 15 Supreme Court decisions)

This rule was expressly recognized in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 247, 60 S. Ct. 811, 84 L. Ed. 1129 (1939); *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 61 S. Ct. 189, 85 L. Ed. 147 (1940); and *United States v. Johnson*, 327 U.S. 106, 111, 66 S. Ct. 464, 90 L. Ed. 562 (1945).

[4] For example, *Silverii v. Kramer*, 3 Cir., 1962, 314 F. 2d 407; *Aetna Casualty & Surety Co. v. Yeatts*, 4 Cir., 1941, 122 F. 2d 350; *Turner v. United States*, 6 Cir., 1956, 229 F. 2d 944, cert. den., 351 U.S. 970, 76 S. Ct. 1038, 100 L. Ed. 1489 (1956); *Stinebower v. Scala*, 7 Cir., 1964, 331 F. 2d 366; *Moist Cold Refrigerator v. Lou Johnson Co.*, 9 Cir., 1957, 249 F. 2d 246, cert. den., 356 U.S. 968, 78 S. Ct. 1008, 2 L. Ed. 2d 1074 (1958); *Tidewater Oil Company v. Waller*, 10 Cir., 1962, 302 F. 2d 638. In *Felton v. Spiro*, 6 Cir., 1897, 78 F. 576, the Court, at page 581, states:

> "A motion for a new trial is, of course, addressed to the discretion of the court, and, if the court exercises its discretion, and either grants or denies the motion, its action is not the subject of review. This is so well settled that it is unnecessary to cite authorities upon the point. But the motion for new trial is a remedy accorded to a party litigant for the correction by the trial court of injustice done by the verdict of a jury. It is one of the most important rights which a party to a jury trial has. It is a right to invoke the discretion of the court to decide whether the injustice of the verdict is such that he ought to have an opportunity to take the case before another jury."

This Court and the Courts of Appeals have held that, although the trial judge's exercise of discretion is ordinarily not reviewable on appeal, an appellate court may nevertheless determine whether a trial judge has abused his discretion.[5] If an abuse is found, the appellate court may and will correct such error; otherwise, the trial judge's exercise of discretion will not be disturbed. This is exactly the procedure followed by the Court of Appeals here. The Petitioner asserted below that the trial court had abused its discretion in granting the new trial, and the Court of Appeals examined the record and determined that there was no abuse of discretion. It was not the function of the Court of Appeals to determine whether it would have ruled on the motion as did the trial judge. Rather its duty was to determine under the record and in light of the circumstances whether the order granting the new trial constituted a clear abuse of discretion. The Court of Appeals correctly found that it was not.

Reasons for Trial Judge's Broad Discretion in Granting New Trial

Petitioner further complains that, because of the limited scope of review, the Fifth Circuit and other federal appellate courts rarely reverse a trial court's granting of a new trial. Such complaint likewise furnishes no basis for granting the Petition for Writ of Certiorari.

It is true that federal appellate courts have rarely reversed a trial court's granting of a new trial. The same is also true in the more common case of a trial judge's denial of a motion

[5] See cases cited in footnotes 3 and 4, supra.

for new trial. Such facts do not serve as a valid basis for Petitioner's charge that Courts of Appeals affirm any and all decisions by district judges to grant new trials; rather, they point up the scarcity of occasions that trial judges have abused their discretion or failed to follow the proper standards in considering motions for new trial. Even more significantly, such clearly indicates that the Fifth Circuit and the other Courts of Appeals have consistently recognized the reason for a trial judge, at common law and under our Constitution and Rules, to be given broad discretion in performing his duties in conducting jury trials. The trial judge, because of his actual presence and participation at the trial, "has the feel of the case which no appellate printed transcript can impart" and is in a position "to view the proceedings in a perspective peculiarly available to him alone."* Recognizing such facts, the Courts of Appeals will not disturb a trial judge's exercise of discretion except where an abuse is clearly evident.

The record here revealed no abuse of discretion in granting the new trial, and the Court of Appeals correctly affirmed the trial judge's action. Therefore, no reason for review by this Court exists.

Trial Judge Properly Granted New Trial Since Verdict Was Contrary to the Weight of the Evidence

At the conclusion of the first trial, the trial court granted Respondent's motion for new trial on the ground "that upon consideration of the evidence as a whole and weighing it, the

* *Cone v. West Virginia Pulp & Paper Company*, 330 U.S. 212, 216, 67 S. Ct. 752, 91 L. Ed. 849 (1946).

Court was of the opinion that the verdict of the jury was wrong and was contrary to the weight of the evidence." Petitioner contends that a trial judge should not weigh the evidence in considering a motion for new trial and cannot grant a new trial if some evidence in defense of the charges of the movant has been presented. In essence, Petitioner is asserting that the trial judge here should have followed the standards applicable to ruling on a motion for judgment notwithstanding the verdict when considering the motion for new trial, and also that the Court of Appeals should have used the tests applicable to motions for judgment n.o.v. in determining whether the trial court had abused its discretion in ruling on the motion for new trial.

The decisions of this Court and of the Courts of Appeals uniformly recognize that **a trial judge exercises an entirely different function in passing upon a motion for new trial than when ruling upon a motion for judgment notwithstanding the verdict.**[1] As stated by Justice Roberts in *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251, 61 S. Ct. 189, 85 L. Ed. 147, 153 (1940):

> "Each motion, as the rule recognizes, has its own office. The motion for judgment cannot be granted unless, as matter of law, the opponent of the motion failed to make a case and, therefore, a verdict in movant's favor should have been directed. The motion for a new trial may invoke the discretion of the court insofar as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive,

[1] *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 61 S. Ct. 189, 85 L. Ed. 147 (1940); *Felton v. Spiro*, 6 Cir., 1897, 78 F. 576; *Aetna Casualty & Surety Co. v. Yeatts*, 4 Cir., 1941, 122 F. 2d 350; *Tidewater Oil Company v. Waller*, 10 Cir., 1962, 302 F. 2d 638; *Marsh v. Illinois Central R. Co.*, 5 Cir., 1949, 175 F. 2d 498.

or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury."

Petitioner has failed to recognize this distinction!

In considering a motion for judgment n.o.v., a trial judge does not weigh the evidence, but rather determines only whether there is some evidence to support the verdict of the jury. If so, a motion for judgment n.o.v. must be denied. On the other hand, a motion for new trial is addressed to the judge's discretion and he may consider the evidence as a whole, weigh it, and if he thinks the jury was mistaken or that the verdict was wrong or that some injustice might occur if the verdict were allowed to stand, although supported by some evidence, he should grant a new trial.[8]

The two decisions of the Supreme Court cited by Petitioner, purportedly to show conflict between the Fifth Circuit and this Court, have no relevance here, since both deal with the question of the scope of a trial court's review of the evidence in considering a motion for judgment n.o.v. and

[8] In *Williams v. Nichols*, 4 Cir., 1959, 266 F. 2d 389, the trial judge, as Petitioner here, failed to distinguish between the two types of motions. There, the trial judge held that in passing on the motion for new trial he must consider the evidence most favorable to the party for whom the verdict was rendered. The Court of Appeals found that the trial court had applied the standard applicable to a motion for directed verdict or a judgment n.o.v., "rather than exercising his own independent judgment after a weighing of *all* the evidence and any other pertinent factors in determining whether the verdict was against the clear weight of the evidence or would result in a miscarriage of justice." The Court of Appeals vacated the judgment and remanded the case for reconsideration of the motion for new trial, "not in the light most favorable to the plaintiff, but according to the analysis and appraisal by the *trial court* of the weight of all the evidence, considering also any other relevant factors."

an appellate court's review of the evidence on appeal from the verdict.* Neither case involves or discusses the functions of either a trial or appellate court in considering a motion for new trial where different rules govern, as pointed out above. The trial judge below applied the correct standard in considering the motion for new trial, and the Court of Appeals properly affirmed such action. Again, no important or special reason for review by this Court is shown by Petitioner.

Trial Judge Properly Considered Other Factors in Granting New Trial

Petitioner has also asserted that the Court of Appeals erred in failing to hold that the trial judge abused his discretion in granting a new trial because he felt that his statements had coerced the jury's verdict and because of the pendency of another suit involving the same questions of fact and law. Such contention furnishes no reason for review by this Court.

This Court and the Courts of Appeals have pointed out that, if for any reason or combination of reasons a trial judge

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* *Mary Tennant v. Peoria & Pekin Union Railway Company*, 321 U.S. 29, 64 S. Ct. 409, 88 L. Ed. 520 (1944), and *Lavender v. Kurn*, 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1945), are merely holdings that a trial court, in considering a motion for directed verdict or a motion for judgment notwithstanding the verdict, or an appellate court, on an appeal from a judgment on the verdict, shall look only to see if there is *some* evidence to support the verdict. If so, even if not substantial or even if the trial judge or appellate court would have drawn conclusions to the contrary, the jury's verdict should not be disturbed. Neither case involves a trial judge's ruling on a motion for new trial or an appellate court's review thereof.

concludes that injustice will result if a verdict is allowed to stand, he has the power and duty to grant a new trial.[10] Here, the trial court decided, in addition to the verdict's being against the weight of the evidence (which was itself sufficient justification for granting a new trial), other factors had possibly caused the jury to reach an unjust result and were considerations in determining that a new trial should be granted. Recognizing that the trial judge was uniquely cognizant of the factors and circumstances surrounding and influencing the outcome of the jury trial, the Court of Appeals properly affirmed the trial judge's ruling, since the record revealed no abuse of discretion.

CONCLUSION

Respondent submits that the Petition for Writ of Certiorari should be denied, since no special or important reasons for granting such Petition are shown or, in fact, exist. There is no conflict between this decision of the Court of Appeals and the decision of another Court of Appeals or of the Supreme Court on the same matter. The Court of Appeals has in no way departed from the accepted and usual course of judicial proceedings nor has it sanctioned a departure from proper judicial proceedings by the trial court. No basis has been demonstrated by Petitioner for this Court's exercising its power of review and supervision. To the contrary, the trial court applied the proper standards or tests in considering and granting the motion for new trial, and the Court of

[10] *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251, 61 S. Ct. 189, 85 L. Ed. 147 (1940); *Eastern Air Lines v. Union Trust Co.*, U.S. App., D.C., 1956, 239 F. 2d 25, 30.

Appeals properly followed the rules pertaining to the scope of appellate review, as announced by the Supreme Court and the Courts of Appeals, in determining that the trial judge had not abused his discretion. Furthermore, the authority and discretion of a trial court to grant a new trial does not deny the right of trial by jury, but rather protects and preserves such right. Respondent, therefore, prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been delivered to counsel for Petitioner by posting same in the United States mail, postage prepaid, properly addressed, on this the 29th day of October, 1965.

Charles P. Storey

Charles P. Storey

END